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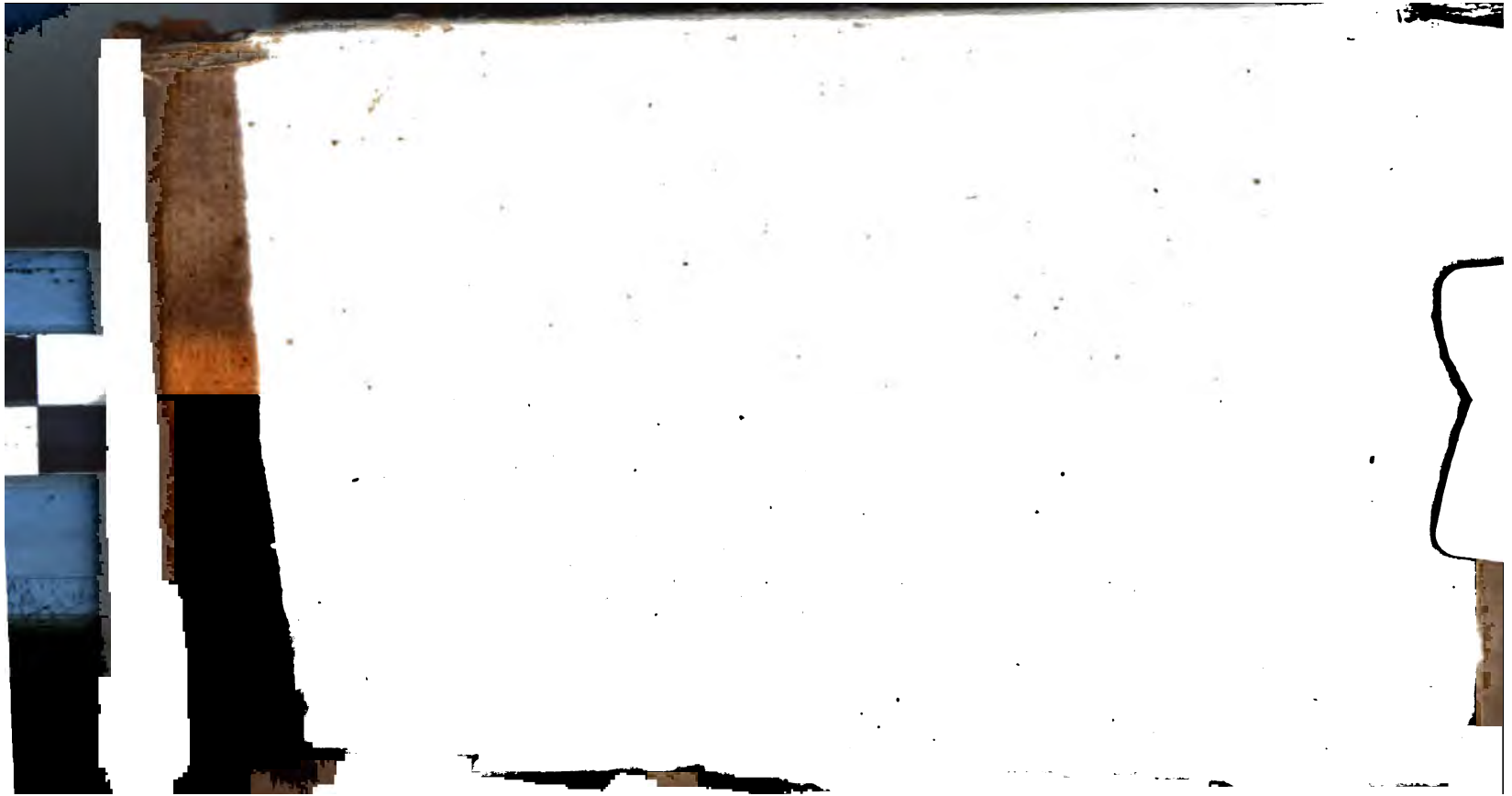

COMMENTARIES

ON

The Laws of England.

IN FOUR BOOKS.

BY SIR WM. BLACKSTONE, KNT.

ONE OF THE JUSTICES OF HIS MAJESTY'S COURT OF COMMON PLEAS.

FROM THE LAST LONDON EDITION

WITH THE LAST CORRECTIONS OF THE AUTHOR; AND WI

NOTES AND ADDITIONS

BY EDWARD CHRISTIAN, ESQUIRE,

CHIEF JUSTICE OF THE ISLE OF MAN,

AND THE DOWNING PROFESSOR OF THE LAWS OF ENGLAND IN THE

UNIVERSITY OF CAMBRIDGE.

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PREFACE.

THE following sheets contain the substance of a course of lectures on the laws of England, which were read by the author in the university of OXFORD. His original plan took its rise in the year 1753: and, notwithstanding the novelty of such an attempt in this age and country, and the prejudices usually conceived against any innovations in the established mode of education, he had the satisfaction to find (and he acknowledges it with a mixture of pride and gratitude) that his endeavours were encouraged and patronized by those, both in the university and out of it, whose good opinion and esteem he was principally desirous to obtain.

THE death of Mr. VINER in 1756, and his ample benefaction to the university for promoting the study of the law, produced about two years afterwards a regular and public establishment of what the author had privately undertaken. The knowledge of our laws and constitution was adopted as a liberal science by general academical authority; competent endowments were decreed for the support of a lecturer, and the perpetual encouragement of students; and the compiler of the ensuing Commentaries had the honor to be elected the first Vinerian professor.

IN this situation he was led, both by duty and inclination, to investigate the elements of the law, and the grounds of our civil polity, with greater assiduity and attention than many have thought it necessary to do. And yet all, who of late years have attended the public administration of justice, must be sensible that a masterly acquaintance with the general spirit of laws and the principles of universal jurisprudence, combined with an ac-

curate knowledge of our own municipal constitutions, their original, reason, and history, hath given a beauty and energy to many modern judicial decisions, with which our ancestors were wholly unacquainted. If, in the pursuit of these inquiries, the author hath been able to rectify any errors which either himself or others may have heretofore imbibed, his pains will be sufficiently answered: and, if in some points he is still mistaken, the candid and judicious reader will make due allowances for the difficulties of a search so new, so extensive, and so laborious.

2 Nov. 1765.

POSTSCRIPT.

NOTWITHSTANDING the diffidence expressed in the foregoing Preface, no sooner was the work completed, but many of its positions were vehemently attacked by zealots of all (even opposite) denominations, religious as well as civil; by some with a greater, by others with a less degree of acrimony. To such of these animadverters as have fallen within the author's notice (for he doubts not but some have escaped it) he owes at least this obligation; that they have occasioned him from time to time to revise his work, in respect to the particulars objected to; to retract or expunge from it what appeared to be really erroneous; to amend or supply it when inaccurate or defective; to illustrate and explain it when obscure. But, where he thought the objections ill-founded, he hath left, and shall leave, the book to defend itself: being fully of opinion, that if his principles be false and his doctrines unwarrantable, no apology from himself can make them right; if founded in truth and rectitude, no censure from others can make them wrong.

TO THE

QUEEN'S MOST EXCELLENT MAJESTY,

THE FOLLOWING VIEW

OF THE LAWS AND CONSTITUTION

OF ENGLAND,

THE IMPROVEMENT AND PROTECTION OF WHICH

HAVE DISTINGUISHED THE REIGN

OF HER MAJESTY'S ROYAL CONSORT,

IS,

WITH ALL GRATITUDE AND HUMILITY,

MOST RESPECTFULLY INSCRIBED

BY HER DUTIFUL

AND MOST OBEDIENT

SERVANT,

WILLIAM BLACKSTONE.

ADVERTISEMENT

TO THE LAST LONDON EDITION.

THE discharge of a duty similar to that to which the world is indebted for the Commentaries on the Laws of England, led the Editor to presume, that in the course of his researches he might be able to collect some observations which might be useful to the Public, and at the same time it suggested the propriety of his endeavouring to contribute to the further improvement of that valuable production.

THE extensive sale of the preceding Editions has abundantly proved that the design meets with general approbation.

No alteration has been made in the author's text; but the principal changes, which either the legislature or the decisions of the courts have introduced into the law since the last corrections of the Author, are specified and explained by the Editor in the notes†.

THE Commentaries on the Laws of England form an essential part of every Gentleman's library: the beautiful and lucid arrangement, the purity of the language, the classic elegance of the quotations and allusions, the clear and intelligible explanation of every subject, must always yield the reader as much pleasure as improvement; and wherever any constitutional or legal question is agitated, they are the first, and, in general, the best authority referred to. In order to add to their utility in this respect, the Editor has annexed such exceptions and particular instances as he thought would render the information still fuller and more complete. Where he has presumed to question any of the learned Commentator's doctrines, he has assigned his reasons for his doubt or dissent; but where he has discovered any inaccuracy arising merely from inadvertence, he has stated it without scruple or ceremony. We should expect

† The Editor's Notes are separated from the Text and Notes of the Author, by a line, and are referred to by figures, thus (1); and the pages of the former editions are preserved in the margin.

more than human excellence, if we imagined that a work, comprising almost the whole system of English jurisprudence, could be entirely free from mistakes. But it is a matter of great concern to the Profession and to the Public at large, that, in an Author so universally read, so deservedly admired, and in whom such confidence is reposed, every subject should be reviewed with scrupulous and critical precision. It has been, and it will continue to be, the Editor's peculiar study and ambition to advance this learned performance to as great a degree of accuracy and perfection as his attention and ability can effect; and he will always be grateful for any correction of his own errors, or for any useful remarks which may not have occurred to him in his examination of the Commentaries.

To prevent any unfounded animadversions, the Editor, or he ought rather perhaps to call himself the Annotator, wishes the purchasers of this Work to be informed, that he holds himself responsible for the utility and accuracy of the Notes in every edition to which his name is prefixed; but that, with regard to every other circumstance attending the publication, he has no direction or control whatever.

Though the Notes in this Edition have been considerably extended, yet there are some important subjects, which the Author has either entirely omitted, or too concisely touched upon; the Editor is therefore preparing to publish separately such additions as these deficiencies in the Commentaries seem to require.

The professional reader ought to be apprized, that the Editor in the Notes has frequently referred to Annotators and the Authors of Law Treatises in preference to original cases, those learned writers in the places cited having generally collected all the original authorities, which would be too numerous to be introduced into a note to the Commentaries.

E. C.

Lincoln's Inn,
May 1, 1803.

ADDENDA.

SINCE this Edition of the Commentaries was printed, a statute has been introduced by Lord Ellenborough, *viz.* the 43 Geo. III. c. 58. which has made the six following important alterations in the criminal law of this country:

I. IF any person shall wilfully and maliciously administer to, or cause to be administered to or taken by, any woman then quick with child, any noxious and destructive substance, with intent thereby to procure the miscarriage of her child, such person, and all who counsel, aid, and abet, shall be guilty of felony without benefit of clergy.

So it is now punishable with death to attempt, by administering drugs, to destroy a living infant *in ventre sa mere*, though it may in no degree be injured. But where medicines are so administered, or any instrument or other means shall be used, to cause an abortion, and the woman shall not be, or shall not be proved to be, at the time quick with child, then such offenders shall be guilty of felony, and shall be liable to be fined, imprisoned, set in the pillory, or whipped, or to one or more of these punishments; or to be transported for any time not exceeding fourteen years, at the discretion of the court.——*See Vol.* I. 130. *n.* 8.

II. IF any person shall wilfully and maliciously administer to, or cause to be administered to or taken by, any of his majesty's subjects, any deadly poison, with intent to murder, he, his counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy.——*See Vol. IV.* 196.

III. THE severe statute the 21 Jac. I. c. 27. and the similar Irish act the 6 Anne, which made it a capital crime for a mother to conceal the birth of her bastard child, are repealed; and it is enacted, that trials in England and Ireland, of women charged with the murder of their bastard children, shall be conducted by the same rules of evidence as other trials for murder.

BUT if the prisoner is acquitted of the murder, the jury may find that she endeavoured to conceal the birth of her child; and for that offence, the court may adjudge her to be imprisoned in the gaol, or house of correction, for any time not exceeding two years.——*See Vol. IV.* 198.

ADDENDA.

IV. If any person shall wilfully and maliciously stab or cut any of his majesty's subjects, with intent to murder, rob, maim, disfigure, or disable him, or to do him some grievous bodily harm, or with intent to resist or prevent the apprehension and detainer of the person so stabbing or cutting, or of any of his accomplices, for offences for which they might be lawfully apprehended and detained, he, his counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy. ——*See Vol. IV.* 207. *n.* 1.

V. If any person shall wilfully and maliciously shoot at any of his majesty's subjects, or shall present or level any kind of loaded fire-arms at any one, and shall attempt to discharge the same by drawing the trigger, or in any other manner, with intent to murder, rob, maim, disfigure, or disable him, or to do him some grievous bodily harm, he, his counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy.

Provided, that if it shall appear upon the trial, that such acts of stabbing and cutting, and such shooting and attempt to discharge fire-arms, were committed under circumstances that, if death had ensued, the same would not have amounted to the crime of murder, then the person indicted shall be acquitted.——*See Vol. IV.* 208. *n.* 2.

VI. If any person shall wilfully and maliciously set fire to any house, outhouse, mill, warehouse, or shop, whether they are in the possession of himself, or of any other person, with intent to injure or defraud his majesty, any of his subjects, or any body corporate, he, his counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy. ——*See Vol. IV.* 221. *n.* 2.

In Vol. III. p. 368. n. 11. it is said, that the judges of the king's bench were divided in opinion, whether the declarations of paupers respecting their settlement ought to be received in evidence after their death, but they have since unanimously determined, that no hearsay-evidence can be received at the quarter sessions, but such as would be admitted in all other courts.——*See the case of King* v. *Ferryfrystone, in* 1 *East's Reports.*

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INTRODUCTION.

OF

THE STUDY, NATURE, AND EXTENT

OF

THE LAWS OF ENGLAND.

INTRODUCTION.

SECTION THE FIRST.

ON THE STUDY OF THE LAW*.

MR. VICE-CHANCELLOR,
AND GENTLEMEN OF THE UNIVERSITY,

THE general expectation of so numerous and respectable an audience, the novelty, and (I may add) the importance of the duty required from this chair, must unavoidably be productive of great diffidence and apprehensions in him who has the honour to be placed in it. He must be sensible how much will depend upon his conduct in the infancy of a study, which is now first adopted by public academical authority; which has generally been reputed (however unjustly) of a dry and unfruitful nature; and of which the theoretical, elementary parts have hitherto received a very moderate share of cultivation. He cannot but reflect that, if either his plan of instruction be crude and injudicious, or the execution of it lame and superficial, it will cast a damp upon the farther progress of this most useful and most rational branch of learning; and may defeat for a time the public-spirited design of our wise and munificent benefac-

* Read in Oxford at the opening of the Vinerian lectures; 25 Oct. 1758.

tor. And this he must more especially dread, when he feels by experience how unequal his abilities are (unassisted by preceding examples) to complete, in the manner he could wish, so extensive and arduous a task; since he freely confesses, that his former more private attempts have fallen very short of his own ideas of perfection. And yet the candour he has already experienced, and this last transcendent mark of regard, his present nomination by the free and unanimous suffrage of a great and learned university, (an honour to be ever remembered with the deepest and most affectionate gratitude,) these testimonies of your public judgment must entirely supersede his own, and forbid him to believe himself totally insufficient for the labour at least of this employment. One thing he will venture to hope for, and it certainly shall be his constant aim, by diligence and attention to atone for his other defects; esteeming, that the best return, which he can possibly make for your favourable opinion of his capacity, will be his unwearied endeavours in some little degree to deserve it.

THE science thus committed to his charge, to be cultivated, methodized, and explained in a course of academical lectures, is that of the laws and constitution of our own country: a species of knowledge, in which the gentlemen of England have been more remarkably deficient than those of all Europe besides. In most of the nations on the continent, where the civil or imperial law under different modifications is closely interwoven with the municipal laws of the land, no gentleman, or at least no scholar, thinks his education is completed, till he has attended a course or two of lectures, both upon the institutes of Justinian and the local constitutions of his native soil, under the very eminent professors that abound in their several universities. And in the northern parts of our own island, where also the municipal laws are frequently connected with the civil, it is difficult to meet with a person of liberal education, who is destitute of a competent knowledge in that science, which is to be the guardian of his natural rights and the rule of his civil conduct.

Nor have the imperial laws been totally neglected even in the English nation. A general acquaintance with their decisions has ever been deservedly considered as no small accomplishment of a gentleman; and a fashion has prevailed, especially of late, to transport the growing hopes of this island to foreign universities, in Switzerland, Germany, and Holland; which, though infinitely inferior to our own in every other consideration, have been looked upon as better nurseries of the civil, or (which is nearly the same) of their own municipal law. In the mean time it has been the peculiar lot of our admirable system of laws, to be neglected, and even unknown, by all but one practical profession; though built upon the soundest foundations, and approved by the experience of ages.

Far be it from me to derogate from the study of the civil law, considered apart from any binding authority as a collection of written reason. No man is more thoroughly persuaded of the general excellence of its rules, and the usual equity of its decisions, nor is better convinced of its use as well as ornament to the scholar, the divine, the statesman, and even the common lawyer. But we must not carry our veneration so far as to sacrifice our Alfred and Edward to the names of Theodosius and Justinian: we must not prefer the edict of the prætor, or the rescript of the Roman emperor, to our own immemorial customs, or the sanctions of an English parliament; unless we can also prefer the despotic monarchy of Rome and Byzantium, for whose meridians the former were calculated, to the free constitution of Britain, which the latter are adapted to perpetuate.

Without detracting therefore from the real merit which abounds in the imperial law, I hope I may have leave to assert, that if an Englishman must be ignorant of either the one or the other, he had better be a stranger to the Roman than the English institutions. For I think it an undeniable position, that a competent knowledge of the laws of that society in which we live, is the proper accomplishment of every

gentleman and scholar; an highly useful, I had almost said essential, part of liberal and polite education. And in this I am warranted by the example of ancient Rome; where, as Cicero informs us[a], the very boys were obliged to learn the twelve tables by heart, as a *carmen necessarium* or indispensable lesson, to imprint on their tender minds an early knowledge of the laws and constitution of their country.

But as the long and universal neglect of this study, with us in England, seems in some degree to call in question the truth of this evident position, it shall therefore be the business of this introductory discourse, in the first place to demonstrate the utility of some general acquaintance with the municipal law of the land, by pointing out its particular uses in all considerable situations of life. Some conjectures will then be offered with regard to the causes of neglecting this useful study: to which will be subjoined a few reflections on the peculiar propriety of reviving it in our own universities.

And, first, to demonstrate the utility of some acquaintance with the laws of the land, let us only reflect a moment on the singular frame and polity of that land, which is governed by this system of laws. A land, perhaps the only one in the universe, in which political or civil liberty is the very end and scope of the constitution[b]. This liberty, rightly understood, consists in the power (1) of doing whatever the laws permit[c]; which is only to be effected by a general conformity of all orders and degrees to those equitable rules of action, by which the meanest individual is protected from the insults and oppression of the greatest. As therefore every subject is interested in the preservation of the laws, it is incumbent

a De Legg. 2. 23.
b Montesq. Esp. L. l. 11. c. 5.
c Facultas ejus, quod cuique facere libet, nisi quid vi, aut jure prohibetur. Inst. 1. 3. 1.

(1) See the Editor's reasons for his disapprobation of this definition of liberty in the note to p. 126.

upon every man to be acquainted with those at least, with which he is immediately concerned; lest he incur the censure, as well as inconvenience, of living in society without knowing the obligations which it lays him under. And thus much may suffice for persons of inferior condition, [7] who have neither time nor capacity to enlarge their views beyond that contracted sphere in which they are appointed to move. But those, on whom nature and fortune have bestowed more abilities and greater leisure, cannot be so easily excused. These advantages are given them, not for the benefit of themselves only, but also of the public: and yet they cannot, in any scene of life, discharge properly their duty either to the public or themselves, without some degree of knowledge in the laws. To evince this the more clearly, it may not be amiss to descend to a few particulars.

Let us therefore begin with our gentlemen of independent estates and fortune, the most useful as well as considerable body of men in the nation; whom even to suppose ignorant in this branch of learning is treated by Mr. Locke[d] as a strange absurdity. It is their landed property, with its long and voluminous train of descents and conveyances, settlements, entails, and incumbrances, that forms the most intricate and most extensive object of legal knowledge. The thorough comprehension of these, in all their minute distinctions, is perhaps too laborious a task for any but a lawyer by profession: yet still the understanding of a few leading principles, relating to estates and conveyancing, may form some check and guard upon a gentleman's inferior agents, and preserve him at least from very gross and notorious imposition.

Again, the policy of all laws has made some forms necessary in the wording of last wills and testaments, and more with regard to their attestation. An ignorance in these must always be of dangerous consequence, to such as by choice or

d Education, sec. 187.

necessity compile their own testaments without any technical assistance. Those who have attended the courts of justice are the best witnesses of the confusion and distresses that are hereby occasioned in families; and of the difficulties that arise in discerning the true meaning of the testator, or sometimes in discovering any meaning at all: so that in the end his [8] estate may often be vested quite contrary to these his enigmatical intentions, because perhaps he has omitted one or two formal words, which are necessary to ascertain the sense with indisputable legal precision, or has executed his will in the presence of fewer witnesses than the law requires.

But to proceed from private concerns to those of a more public consideration. All gentlemen of fortune are, in consequence of their property, liable to be called upon to establish the rights, to estimate the injuries, to weigh the accusations, and sometimes to dispose of the lives of their fellow-subjects, by serving upon juries. In this situation they have frequently a right to decide, and that upon their oaths, questions of nice importance, in the solution of which some legal skill is requisite; especially where the law and the fact, as it often happens, are intimately blended together. And the general incapacity, even of our best juries, to do this with any tolerable propriety, has greatly debased their authority; and has unavoidably thrown more power into the hands of the judges, to direct, control, and even reverse their verdicts, than perhaps the constitution intended.

But it is not as a juror only that the English gentleman is called upon to determine questions of right, and distribute justice to his fellow-subjects: it is principally with this order of men that the commission of the peace is filled. And here a very ample field is opened for a gentleman to exert his talents, by maintaining good order in his neighbourhood; by punishing the dissolute and idle; by protecting the peaceable and industrious; and, above all, by healing petty differences and preventing vexatious prosecutions. But, in order to attain these desirable ends, it is necessary that the magistrate

should understand his business; and have not only the will, but the power also, (under which must be included the knowledge,) of administering legal and effectual justice. Else, when he has mistaken his authority, through passion, through ignorance, or absurdity, he will be the object of [9] contempt from his inferiors, and of censure from those to whom he is accountable for his conduct.

YET farther; most gentlemen of considerable property, at some period or other in their lives, are ambitious of representing their country in parliament: and those, who are ambitious of receiving so high a trust, would also do well to remember its nature and importance. They are not thus honourably distinguished from the rest of their fellow-subjects, merely that they may privilege their persons, their estates, or their domestics; that they may list under party banners; may grant or withhold supplies; may vote with or vote against a popular or unpopular administration; but upon considerations far more interesting and important. They are the guardians of the English constitution; the makers, repealers, and interpreters of the English laws; delegated to watch, to check, and to avert every dangerous innovation, to propose, to adopt, and to cherish any solid and well-weighed improvement; bound by every tie of nature, of honour, and of religion, to transmit that constitution and those laws to their posterity, amended if possible, at least without any derogation. And how unbecoming must it appear in a member of the legislature to vote for a new law, who is utterly ignorant of the old! what kind of interpretation can he be enabled to give, who is a stranger to the text upon which he comments!

INDEED it is perfectly amazing that there should be no other state of life, no other occupation, art, or science, in which some method of instruction is not looked upon as requisite, except only the science of legislation, the noblest and most difficult of any. Apprenticeships are held necessary to almost every art, commercial or mechanical: a long course

of reading and study must form the divine, the physician, and the practical professor of the laws: but every man of superior fortune thinks himself *born* a legislator. Yet [10] Tully was of a different opinion; "it is necessary (says "he[e]) for a senator to be thoroughly acquainted with "the constitution; and this (he declares) is a knowledge of "the most extensive nature; a matter of science, of dili-"gence, of reflection; without which no senator can possi-"bly be fit for his office."

THE mischiefs that have arisen to the public from inconsiderate alterations in our laws, are too obvious to be called in question; and how far they have been owing to the defective education of our senators, is a point well worthy the public attention. The common law of England has fared like other venerable edifices of antiquity, which rash and unexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement. Hence frequently its symmetry has been destroyed, its proportions distorted, and its majestic simplicity exchanged for specious embellishments and fantastic novelties. For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies, and delays, (which have sometimes disgraced the English, as well as other courts of justice,) owe their original not to the common law itself, but to innovations that have been made in it by acts of parliament; "overladen (as sir Edward Coke expresses it[f]) with provisoes and additions, and "many times on a sudden penned or corrected by men of "none, or very little judgment in law." This great and well-experienced judge declares, that in all his time he never knew two questions made upon rights merely depending upon the common law; and warmly laments the confusion introduced by ill-judging and unlearned legislators. "But "if," he subjoins, "acts of parliament were after the old "fashion penned, by such only as perfectly knew what the

e De Legg. 3. 18. Est senatori necessarium posse rempublicam; idque late patet:—genus hoc omne scientiae, diligentiae, memoriae est; sine quo paratus esse senator nullo pacto potest.

f 2 Rep. Pref.

" common law was before the making of any act of parlia-
" ment concerning that matter, as also how far forth former
" statutes had provided remedy for former mischiefs, and
" defects discovered by experience; then should very few
" questions in law arise, and the learned should not so
" often and so much perplex their heads to make atone- [11]
" ment and peace, by construction of law, between insen-
" sible and disagreeing words, sentences, and provisoes, as they
" now do." And if this inconvenience was so heavily felt in the reign of queen Elizabeth, you may judge how the evil is increased in later times, when the statute book is swelled to ten times a larger bulk; unless it should be found, that the penners of our modern statutes have proportionably better informed themselves in the knowledge of the common law.

WHAT is said of our gentlemen in general, and the propriety of their application to the study of the laws of their country, will hold equally strong or still stronger with regard to the nobility of this realm, except only in the article of serving upon juries. But, instead of this, they have several peculiar provinces of far greater consequence and concern; being not only by birth hereditary counsellors of the crown, and judges upon their honour of the lives of their brother-peers, but also arbiters of the property of all their fellow-subjects, and that in the last resort. In this their judicial capacity they are bound to decide the nicest and most critical points of the law: to examine and correct such errors as have escaped the most experienced sages of the profession, the lord keeper and the judges of the courts at Westminster. Their sentence is final, decisive, irrevocable; no appeal, no correction, not even a review can be had: and to their determination, whatever it be, the inferior courts of justice must conform; otherwise the rule of property would no longer be uniform and steady.

SHOULD a judge in the most subordinate jurisdiction be deficient in the knowledge of the law, it would reflect infinite contempt upon himself, and disgrace upon those who

employ him. And yet the consequence of his ignorance is comparatively very trifling and small: his judgment may be examined, and his errors rectified by other courts. But how much more serious and affecting is the case of a [12] superior judge, if without any skill in the laws he will boldly venture to decide a question upon which the welfare and subsistence of whole families may depend! where the chance of his judging right or wrong, is barely equal; and where, if he chances to judge wrong, he does an injury of the most alarming nature, an injury without possibility of redress.

YET, vast as this trust is, it can no where be so properly reposed, as in the noble hands where our excellent constitution has placed it: and therefore placed it, because, from the independence of their fortune and the dignity of their station, they are presumed to employ that leisure which is the consequence of both, in attaining a more extensive knowledge of the laws than persons of inferior rank; and because the founders of our polity relied upon that delicacy of sentiment, so peculiar to noble birth; which, as on the one hand it will prevent either interest or affection from interfering in questions of right, so on the other it will bind a peer in honour, an obligation which the law esteems equal to another's oath, to be master of those points upon which it is his birth-right to decide.

THE Roman pandects will furnish us with a piece of history not unapplicable to our present purpose. Servius Sulpicius, a gentleman of the patrician order, and a celebrated orator, had occasion to take the opinion of Quintus Mutius Scaevola, the then oracle of the Roman law; but, for want of some knowledge in that science, could not so much as understand even the technical terms, which his friend was obliged to make use of. Upon which Mutius Scaevola could not forbear to upbraid him with this memorable reproof[g], "that "it was a shame for a patrician, a nobleman, and an orator

[g] Ff. 1. 2. 2. sec. 43. Turpe esse patricio, et nobili, et causas oranti, jus in quo versaretur ignorare.

" of causes, to be ignorant of that law in which he was so " peculiarly concerned." This reproach made so deep an impression on Sulpicius, that he immediately applied himself to the study of the law; wherein he arrived to [13] that proficiency, that he left behind him about a hundred and fourscore volumes of his own compiling upon the subject; and became, in the opinion of Cicero[h], a much more complete lawyer than even Mutius Scaevola himself.

I WOULD not be thought to recommend to our English nobility and gentry, to become as great lawyers as Sulpicius; though he, together with this character, sustained likewise that of an excellent orator, a firm patriot, and a wise indefatigable senator: but the inference which arises from the story is this, that ignorance of the laws of the land hath ever been esteemed dishonourable in those, who are entrusted by their country to maintain, to administer, and to amend them.

BUT surely there is little occasion to enforce this argument any farther to persons of rank and distinction, if we of this place may be allowed to form a general judgment from those who are under our inspection: happy that while we lay down the rule, we can also produce the example. You will therefore permit your professor to indulge both a public and private satisfaction, by bearing this open testimony; that, in the infancy of these studies among us, they were favoured with the most diligent attendance, and pursued with the most unwearied application, by those of the noblest birth and most ample patrimony: some of whom are still the ornaments of this seat of learning; and others at a greater distance continue doing honour to its institutions, by comparing our polity and laws with those of other kingdoms abroad, or exerting their senatorial abilities in the councils of the nation at home.

NOR will some degree of legal knowledge be found in the least superfluous to persons of inferior rank: especially those

h Brut. 41.

of the learned professions. The clergy in particular, besides the common obligations they are under in proportion to their rank and fortune, have also abundant reason, con-
[14] sidered merely as clergymen, to be acquainted with many branches of the law, which are almost peculiar and appropriated to themselves alone. Such are the laws relating to advowsons, institutions, and inductions; to simony, and simoniacal contracts; to uniformity, residence, and pluralities; to tithes, and other ecclesiastical dues; to marriages, (more especially of late,) and to a variety of other subjects, which are consigned to the care of their order by the provisions of particular statutes. To understand these aright, to discern what is warranted or enjoined, and what is forbidden by law, demands a sort of legal apprehension; which is no otherwise to be acquired, than by use and a familiar acquaintance with legal writers.

For the gentlemen of the faculty of physic, I must frankly own that I see no special reason, why they in particular should apply themselves to the study of the law; unless in common with other gentlemen, and to complete the character of general and extensive knowledge; a character which their profession, beyond others, has remarkably deserved. They will give me leave, however, to suggest, and that not ludicrously, that it might frequently be of use to families upon sudden emergencies, if the physician were acquainted with the doctrine of last wills and testaments, at least so far as relates to the formal part of their execution.

But those gentlemen who intend to profess the civil and ecclesiastical laws, in the spiritual and maritime courts of this kingdom, are of all men (next to common lawyers) the most indispensably obliged to apply themselves seriously to the study of our municipal laws. For the civil and canon laws, considered with respect to any intrinsic obligation, have no force or authority in this kingdom; they are no more binding in England than our laws are binding at Rome. But as far as these foreign laws, on account of some pecu-

liar propriety, have in some particular cases, and in some particular courts, been introduced and allowed by our laws, so far they oblige, and no farther; their authority being wholly founded upon that permission and adoption. In which we are not singular in our notions: for even in [15] Holland, where the imperial law is much cultivated and its decisions pretty generally followed, we are informed by Van Leeuwen[i], that "it receives its force from custom "and the consent of the people either tacitly or expressly "given: for otherwise (he adds) we should no more be bound "by this law, than by that of the Almains, the Franks, the "Saxons, the Goths, the Vandals, and other of the ancient "nations." Wherefore, in all points in which the different systems depart from each other, the law of the land takes place of the law of Rome, whether ancient or modern, imperial or pontifical. And, in those of our English courts wherein a reception has been allowed to the civil and canon laws, if either they exceed the bounds of that reception, by extending themselves to other matters than are permitted to them; or if such courts proceed according to the decisions of those laws, in cases wherein it is controlled by the law of the land, the common law in either instance both may, and frequently does, prohibit and annul their proceedings[k]: and it will not be a sufficient excuse for them to tell the king's courts at Westminster, that their practice is warranted by the laws of Justinian or Gregory, or is conformable to the decrees of the Rota or imperial chamber. For which reason it becomes highly necessary for every civilian and canonist, that would act with safety as a judge, or with prudence and reputation as an advocate, to know in what cases and how far the English laws have given sanction to the Roman; in what points the latter are rejected; and where they are both so intermixed and blended together as to form certain supplemental parts of the common law of England, distinguished by the titles of the king's maritime, the king's military, and the king's eccle-

i Dedicatio corporis juris civilis. Edit. 1663. 5 Rep. Caudrey's case. 2 Inst. 599.
k Hale Hist. C. L. c. 2. Selden in Fletam.

siastical law. The propriety of which inquiry the university of Oxford has for more than a century so thoroughly seen, that in her statutes[l] she appoints, that one of the three questions to be annually discussed at the act by the jurist-inceptors shall relate to the common law; subjoining this
[16] reason, "*quia juris civilis studiosos decet haud imperitos esse juris municipalis, et differentias exteri patriique juris notas habere.*" And the statutes[m] of the university of Cambridge speak expressly to the same effect.

FROM the general use and necessity of some acquaintance with the common law, the inference were extremely easy with regard to the propriety of the present institution, in a place to which gentlemen of all ranks and degrees resort, as the fountain of all useful knowledge. But how it has come to pass that a design of this sort has never before taken place in the university, and the reason why the study of our laws has in general fallen into disuse, I shall previously proceed to inquire.

SIR John Fortescue, in his panegyric on the laws of England, (which was written in the reign of Henry the sixth) puts[n] a very obvious question in the mouth of the young prince, whom he is exhorting to apply himself to that branch of learning; "why the laws of England, being so good, "so fruitful, and so commodious, are not taught in the uni-"versities, as the civil and canon laws are?" In answer to which he gives[o] what seems, with due deference be it spoken, a very jejune and unsatisfactory reason; being, in short, that "as the proceedings at common law were in his time car-"ried on in three different tongues, the English, the Latin, "and the French, that science must be necessarily taught "in those three several languages; but that in the universi-"ties all sciences were taught in the Latin tongue only;" and therefore he concludes, "that they could not be conve-

l Tit. VII. sec. 2. sec. 2.

m Doctor legum mox a doctoratu dabit operam legibus Angliae, ut non sit imperitus earum legum quas habet sua patria, et differentias exteri patriique juris noscat. Stat. Eliz. R. c. 14. Cowel. Institut. in proemio.

n c. 47. o c. 46.

"niently taught or studied in our universities." But without attempting to examine seriously the validity of this reason, (the very shadow of which by the wisdom of your late constitutions is entirely taken away,) we perhaps may find out a better, or at least a more plausible account, why the study of the municipal laws has been banished from these seats of science, than what the learned chancellor thought it prudent to give to his royal pupil.

[17] THAT ancient collection of unwritten maxims and customs, which is called the common law, however compounded or from whatever fountains derived, had subsisted immemorially in this kingdom; and, though somewhat altered and impaired by the violence of the times, had in great measure weathered the rude shock of the Norman conquest. This had endeared it to the people in general, as well because its decisions were universally known, as because it was found to be excellently adapted to the genius of the English nation. In the knowledge of this law consisted great part of the learning of those dark ages; it was then taught, says Mr. Selden [p], in the monasteries, *in the universities*, and in the families of the principal nobility. The clergy in particular, as they then engrossed almost every other branch of learning, so (like their predecessors the British Druids [q]) they were peculiarly remarkable for their proficiency in the study of the law. *Nullus clericus nisi causidicus*, is the character given of them soon after the conquest by William of Malmsbury [r]. The judges therefore were usually created out of the sacred order [s], as was likewise the case among the Normans [t]; and all the inferior offices were supplied by the lower clergy, which has occasioned their successors to be denominated *clerks* to this day.

p In Fletam. 7. 7.

q Cæsar de bello Gal. 6. 13.

r de gest. reg. l. 4.

s Dugdale Orig. jurid. c. 8.

t Les juges sont sages personnes et autentiques,—alcome les archevesques, evesques, les chanoines des eglises cathedraulx, et les autres personnes qui ont dignitez in saincte eglise; les abbez, les prieurs conventaulx, et les gouverneurs des eglises, etc. Grand Coustumier, c. 9.

But the common law of England, being not committed to writing, but only handed down by tradition, use, and experience, was not so heartily relished by the foreign clergy, who came over hither in shoals during the reign of the conqueror and his two sons, and were utter strangers to our constitution as well as our language. And an accident, which soon after happened, had nearly completed its ruin. A copy of Justinian's pandects, being newly[u] discovered at
[18] Amalfi, soon brought the civil law into vogue all over the west of Europe, where before it was quite laid aside[w] and in a manner forgotten; though some traces of its authority remained in Italy[x] and the eastern provinces of the empire[y]. This now became in a particular manner the favourite of the popish clergy, who borrowed the method and many of the maxims of the canon law from this original. The study of it was introduced into several universities abroad, particularly that of Bologna; where exercises were performed, lectures read, and degrees conferred in this faculty, as in other branches of science: and many nations on the continent, just then beginning to recover from the convulsions consequent upon the overthrow of the Roman empire, and settling by degrees into peaceable forms of government, adopted the civil law, (being the best written system then extant,) as the basis of their several constitutions; blending and interweaving it among their own feodal customs, in some places with a more extensive, in others a more confined authority[z].

Nor was it long before the prevailing mode of the times reached England. For Theobald, a Norman abbot, being elected to the see of Canterbury[a], and extremely addicted to this new study, brought over with him in his retinue many learned proficients therein; and among the rest Roger sir-

u circ. A. D. 1130.
w LL. Wisigoth. 2. 1. 9.
x Capitular. Hludov. Pii. 4. 102.
y Selden in Fletam. 5. 5.
z Domat's treatise of law. c. 13. sec. 9. Epistol. Innocent. IV. in M. Paris ad A. D. 1254.
a A. D. 1138.

named Vacarius, whom he placed in the university of Oxford[b], to teach it to the people of this country. But it did not meet with the same easy reception in England, where a mild and rational system of laws had been long established, as it did upon the continent; and though the monkish clergy (devoted to the will of a foreign primate) received it with eagerness and zeal, yet the laity, who were more interested to preserve the old constitution, and had already severely felt the effect of many Norman innovations, continued wedded to the use of the common law. King Stephen immediately published a proclamation[c], forbidding the study [19] of the laws, then newly imported from Italy; which was treated by the monks[d] as a piece of impiety, and though it might prevent the introduction of the civil law process into our courts of justice, yet did not hinder the clergy from reading and teaching it in their own schools and monastries.

From this time the nation seems to have been divided into two parties; the bishops and clergy, many of them foreigners, who applied themselves wholly to the study of the civil and canon laws, which now came to be inseparably interwoven with each other; and the nobility and laity, who adhered with equal pertinacity to the old common law: both of them reciprocally jealous of what they were unacquainted with, and neither of them perhaps allowing the opposite system that real merit which is abundantly to be found in each (2).

b Gervas. Dorobern. Act. Pontif. Cantuar. col. 1665.

c Rog. Bacon. citat. per Selden in Fletam. 7. 6. in Fortesc. c. 33. and 8 Rep. Pref.

d Joan. Sarisburiens. Polycrat. 8. 22.

(2) Though the civil law, in matters of contract and the general commerce of life, may be founded in principles of natural and universal justice, yet the arbitrary and despotic maxims, which recommended it as a favourite to the pope and the Romish clergy, rendered it deservedly odious to the people of England. *Quod principi placuit legis habet vigorem*, (Inst. 1. 2. 6.) the *magna charta* of the civil law, could never be reconciled with the *judicium parium vel lex terræ*.

This appears, on the one hand, from the spleen with which the monastic writers[e] speak of our municipal laws upon all occasions; and, on the other, from the firm temper which the nobility shewed at the famous parliament of Merton: when the prelates endeavoured to procure an act, to declare all bastards legitimate in case the parents intermarried at any time afterwards; alleging this only reason, because holy church (that is, the canon law) declared such children legitimate: but "all the earls and barons (says the parliament "roll[f]) with one voice answered, that they would not change "the laws of England, which had hitherto been used and "approved." And we find the same jealousy prevailing above a century afterwards[g], when the nobility declared with a kind of prophetic spirit, "that the realm of England "hath never been unto this hour, neither by the consent of "our lord the king and the lords of parliament shall it [20] "ever be, ruled or governed by the civil law[h]." And of this temper between the clergy and laity many more instances might be given.

WHILE things were in this situation, the clergy, finding it impossible to root out the municipal law, began to withdraw themselves by degrees from the temporal courts; and to that end, very early in the reign of king Henry the third, episcopal constitutions were published[i], forbidding all ecclesiastics to appear as advocates *in foro caeculari:* nor did they long continue to act as judges there, not caring to take the oath of office which was then found necessary to be administered, that they should in all things determine according to the law and custom of this realm[k]; though they still kept possession of the high office of chancellor, an office then of little juridical power; and afterwards as its business

e Joan Sarisburiens. Polycrat. 5. 16. Polydor. Virgil. Hist. l. 9.

f Stat. Merton. 20 Hen. III. c. 9. Et omnes comites et barones una voce responderunt, quod nolunt leges Angliae mutare, quae hucusque usitatae sunt et approbatae.

g 11 Ric. II.

h Selden. Jan. Anglor. l. 2. sec. 43. in Fortesc. c. 33.

i Spelman. Concil. A. D. 1217. Wilkins. vol. 1. p. 574. 599.

k Selden. in Fletam. 9. 3.

increased by degrees, they modelled the process of the court at their own discretion.

But wherever they retired, and wherever their authority extended, they carried with them the same zeal to introduce the rules of the civil, in exclusion of the municipal law. This appears in a particular manner from the spiritual courts of all denominations, from the chancellor's courts in both our universities, and from the high court of chancery before mentioned; in all of which the proceedings are to this day in a course much conformed to the civil law: for which no tolerable reason can be assigned, unless that these courts were all under the immediate direction of the popish ecclesiastics, among whom it was a point of religion to exclude the municipal law; pope Innocent the fourth having forbidden[1] the very reading of it by the clergy, because its decisions were not founded on the imperial constitutions, but merely on the customs of the laity. And if it be considered, that our universities began about that period to receive their present form of scholastic discipline; that they were then, and continued to be till the time of the reformation, entirely under the influence of the popish clergy; (sir John [21] Mason the first protestant, being also the first lay, chancellor of Oxford;) this will lead us to perceive the reason, why the study of the Roman laws was in those days of bigotry[m] pursued with such alacrity in these seats of learn-

1 M. Paris ad A. D. 1254.

m There cannot be a stronger instance of the absurd and superstitious veneration that was paid to these laws, than that the most learned writers of the times thought they could not form a perfect character, even of the blessed virgin, without making her a civilian and a canonist; which Albertus Magnus, the renowned dominican doctor of the thirteenth century, thus proves in his Summa de laudibus christiferae virginis (divinum magis quam humanum opus) qu. 23. sec. 5. "Item "quod jura civilia, et leges, et decreta scivit "in summo, probatur hoc modo; sapientia "advocati manifestatur in tribus; unum, quod "obtineat omnia contra judicem justum et "sapientem; secundo, quod contra adversa-"rium astutum et sagacem; tertio, quod in "causa desperata: sed beatissima virgo, con-"tra judicem sapientissimum, Dominum; "contra adversarium callidissimum, dyabo-"lum; in causa nostra desperata; sententiam "optatam obtinuit." To which an eminent "franciscan, two centuries afterwards, Ber-"nardinus de Busti (Mariale, part. 4. serm. "9.) very gravely subjoins this note. "Nec "videtur incongruum mulieres habere peri-"tiam juris. Legitur enim de uxore Joannis

ing; and why the common law was entirely despised, and esteemed little better than heretical.

And, since the reformation, many causes have conspired to prevent its becoming a part of academical education. As, first, long usage and established custom; which, as in every thing else, so especially in the forms of scholastic exercise, have justly great weight and authority. Secondly, the real intrinsic merit of the civil law, considered upon the footing of reason and not of obligation, which was well known to the instructors of our youth; and their total ignorance of the merit of the common law, though its equal at least, and perhaps an improvement on the other. But the principal reason of all, that has hindered the introduction of this branch of learning, is, that the study of the common law, being banished from hence in the times of popery, has fallen into a quite different channel, and has hitherto been wholly cultivated in another place. But as the long usage and established custom, of ignorance of the laws of the land, begin now to be thought unreasonable; and as by these means [22] the merit of those laws will probably be more generally known; we may hope that the method of studying them will soon revert to its ancient course, and the foundations at least of that science will be laid in the two universities; without being exclusively confined to the channel which it fell into at the times I have just been describing.

For, being then entirely abandoned by the clergy, a few stragglers excepted, the study and practice of it devolved of course into the hands of laymen: who entertained upon their parts a most hearty aversion to the civil law[n], and made no scruple to profess their contempt, nay even their ignorance[o]

[m] Andreae glossatoris, quod tantam peritiam "in utroque jure habuit, ut publice in scholis "legere ausa sit."

[n] Fortesc. de laud. LL. c. 25.

[o] This remarkably appeared in the case of the abbot of Torun, M. 22. Edw. III. 24. who had caused a certain prior to be summoned to answer at Avignon for erecting an oratory contra inhibitionem novi operis; by which words Mr. Selden, (in Flet. 8. 5.) very justly understands to be meant the title de novi operis nuntiatione both in the civil and canon

of it, in the most public manner. But still as the balance of learning was greatly on the side of the clergy, and as the common law was no longer *taught*, as formerly, in any part of the kingdom, it must have been subjected to many inconveniences, and perhaps would have been gradually lost and overrun by the civil, (as suspicion well justified from the frequent transcripts of Justinian to be met with in Bracton and Fleta,) had it not been for a peculiar incident, which happened at a very critical time, and contributed greatly to its support.

THE incident which I mean was the fixing the court of common pleas, the grand tribunal for disputes of property, to be held in one certain spot; that the seat of ordinary justice might be permanent and notorious to all the nation. Formerly that, in conjunction with all the other superior courts, was held before the king's capital justiciary of [23] England, in the *aula regis*, or such of his palaces wherein his royal person resided; and removed with his household from one end of the kingdom to the other. This was found to occasion great inconvenience to the suitors; to remedy which it was made an article of the great charter of liberties, both that of king John and king Henry the third[p], that "com-"mon pleas should no longer follow the king's court, but be "held in some certain place:" in consequence of which they have ever since been held (a few necessary removals in times of the plague excepted) in the palace of Westminster only. This brought together the professors of the municipal law, who before were dispersed about the kingdom, and formed them into an aggregate body; whereby a society was esta-

laws, (Ff. 39. 1. C. 8. 11. and Decretal. not Extrav. 5. 32.) whereby the erection of any new buildings in prejudice of more ancient ones was prohibited. But Skipwith the king's serjeant, and afterwards chief baron of the Exchequer, declares them to be flat nonsense: "*in ceux parolx*, contra inhibitionem novi "operis, *ny ad pas entendment*:" and justice Schardelow mends the matter but little by informing him, that they signify a restitution *in their law*: for which reason he very sagely resolves to pay no sort of regard to them, "Ceo n'est que un restitution en leur ley, pur "que a ceo n'avomus regard, *&c.*"

[p] c. 11.

blished of persons, who, (as Spelman[q] observes,) addicting themselves wholly to the study of the laws of the land, and no longer considering it as a mere subordinate science for the amusement of leisure hours, soon raised those laws to that pitch of perfection, which they suddenly attained under the auspices of our English Justinian, king Edward the first.

In consequence of this lucky assemblage, they naturally fell into a kind of collegiate order, and, being excluded from Oxford and Cambridge, found it necessary to establish a new university of their own. This they did by purchasing at various times certain houses (now called the inns of court and of chancery) between the city of Westminster, the place of holding the king's courts, and the city of London; for advantage of ready access to the one, and plenty of provisions in the other[r]. Here exercises were performed, lectures read, and degrees were at length conferred in the common law, as at other universities in the canon and civil. The degrees were those of barristers (first styled apprentices[s] [24] from *apprendre*, to learn) who answered to our bachelors: as the state and degree of a serjeant[t], *servientis ad legem*, did to that of doctor.

The crown seems to have soon taken under its protection this infant seminary of common law; and, the more effectu-

q Glossar. 334.

r Fortesc. c. 48.

s Apprentices or barristers seem to have been first appointed by an ordinance of king Edward the first in parliament, in the 20th year of his reign. (Spelm. Gloss. 37. Dugdale, Orig. jurid. 55.)

t The first mention which I have met with in our law books of serjeants or countors, is in the statute of Westm. 1. 3 Edw. I. c. 29. and in Horn's Mirror, c. 1. sec. 10. c. 2. sec. 5. c. 3. sec. 1. in the same reign. But M. Paris in his life of John II. abbot of St. Alban's, which he wrote in 1255, 39 Hen. III. speaks of advocates at the common law, or countors, (quos banci narratores vulgariter appellamus,) as of an order of men well known. And we have an example of the antiquity of the coif in the same author's history of England, A. D. 1259, in the case of one William de Busy; who, being called to account for his great knavery and malpractices, claimed the benefit of his orders or clergy, which till then remained an entire secret; and to that end voluit ligamenta coifae suae solvere, ut palam monstraret se tonsuram habere clericalem; sed non est permissus.—Satelles vero eum arripiens, non per coifae ligamina sed per guttur eum apprehendens, traxit ad carcerem. And hence sir H. Spelman conjectures, (Glossar. 335.) that coifs were introduced to hide the tonsure of such renegade clerks, as were still tempted to remain in the secular courts in the quality of advocates or judges, notwithstanding their prohibition by canon.

ally to foster and cherish it, king Henry the third, in the nineteenth year of his reign, issued out an order directed to the mayor and sheriffs of London, commanding that no regent of any law schools *within* that city should for the future teach law therein[u]. The word, law, or *leges*, being a general term, may create some doubt at this distance of time whether the teaching of the civil law, or the common, or both, is hereby restrained. But in either case it tends to the same end. If the civil law only is prohibited, (which is Mr. Selden's[w] opinion,) it is then a retaliation upon the clergy, who had excluded the common law from *their* seats of learning. If the municipal law be also included in the restriction, (as sir Edward Coke[x] understands it, and which the words seem to import,) then the intention is evidently this; by preventing private teachers within the walls of the city, to collect all the common lawyers into the one public university, which was newly instituted in the suburbs.

In this juridical university (for such it is insisted to [25] have been by Fortescue[y] and sir Edward Coke[z]) there are two sorts of collegiate houses; one called inns of chancery, in which the younger students of the law were usually placed, "learning and studying, says Fortescue[a], the ori- "ginals, and as it were the elements of the law; who, profit- "ing therein, as they grew to ripeness, so were they admit- "ted into the greater inns of the same study, called the inns "of court." And in these inns of both kinds, he goes on to tell us, the knights and barons, with other grandees and noblemen of the realm, did use to place their children, though they did not desire to have them thoroughly learned in the law, or to get their living by its practice: and that in his time there were about two thousand students at these several inns, all of whom he informs us were *filii nobilium*, or gentlemen born.

u Ne aliquis scholas regens de legibus in eadem civitate de cætero ibidem leges doceat.

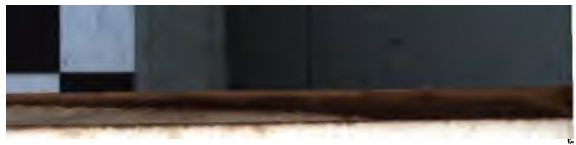
w in Flet. 8. 2.

x 2 Inst. proem.

y c. 49.

z 3 Rep. pref.

a c. 49.



HENCE it is evident, that (though under the influence of the monks our universities neglected this study, yet) in the time of Henry the sixth it was thought highly necessary, and was the universal practice, for the young nobility and gentry to be instructed in the originals and elements of the laws. But by degrees this custom has fallen into disuse; so that in the reign of queen Elizabeth sir Edward Coke[b] does not reckon above a thousand students, and the number at present is very considerably less. Which seems principally owing to these reasons: first, because the inns of chancery being now almost totally filled by the inferior branch of the profession, are neither commodious nor proper for the resort of gentlemen of any rank or figure; so that there are very rarely(3) any young students entered at the inns of chancery: secondly, because in the inns of court all sorts of regimen and academical superintendance, either with regard to morals or studies, are found impracticable, and therefore entirely neglected: lastly, because persons of birth and fortune, after having finished their usual courses at the universities, have seldom [26] leisure or resolution sufficient to enter upon a new scheme of study at a new place of instruction. Wherefore few gentlemen now resort to the inns of court, but such for whom the knowledge of practice is absolutely necessary; such, I mean, as are intended for the profession: the rest of our gentry (not to say our nobility also) having usually

b 3 Rep. Pref.

(3) The inns of court are, the Inner Temple, Middle Temple, Lincoln's Inn, and Gray's Inn, from which societies alone, students are called to the bar. The inns of chancery are Clifford's Inn, Clement's Inn, Lion's Inn, New Inn, Furnival's Inn, Thavies's Inn, Staple's Inn, and Barnard's Inn. These are subordinate to the inns of court; the three first belong to the Inner Temple, the fourth to the Middle Temple, the two next to Lincoln's Inn, and the two last to Gray's Inn. (Dug. *Orig. jurid.* 320 & *passim.*) Gentlemen are never entered at present in the inns of chancery with an intention of being called to the bar, for admission there would now be of no avail with regard to the time and attendance required by the inns of court.

retired to their estates, or visited foreign kingdoms, or entered upon public life, without any instruction in the laws of the land, and indeed with hardly any opportunity of gaining instruction, unless it can be afforded them in these seats of learning.

And that these are the proper places, for affording assistances of this kind to gentlemen of all stations and degrees, cannot (I think) with any colour of reason be denied. For not one of the objections, which are made to the inns of court and chancery, and which I have just now enumerated, will hold with regard to the universities. Gentlemen may here associate with gentlemen of their own rank and degree. Nor are their conduct and studies left entirely to their own discretion; but regulated by a discipline so wise and exact, yet so liberal, so sensible, and manly, that their conformity to its rules (which does at present so much honour to our youth) is not more the effect of constraint than of their own inclinations and choice. Neither need they apprehend too long an avocation hereby from their private concerns and amusements, or (what is a more noble object) the service of their friends and their country. This study will go hand in hand with their other pursuits: it will obstruct none of them; it will ornament and assist them all.

But if, upon the whole, there are any still wedded to monastic prejudice, that can entertain a doubt how far this study is properly and regularly *academical*, such persons I am afraid either have not considered the constitution and design of an university, or else think very meanly of it. It must be a deplorable narrowness of mind, that would confine these seats of instruction to the limited views of one or two learned professions. To the praise of this age be it spoken, a more open and generous way of thinking begins now uni- [27] versally to prevail. The attainment of liberal and gen-

teel accomplishments, though not of the intellectual sort, has been thought by our wisest and most affectionate patrons[c], and very lately by the whole university[d], no small improvement of our ancient plan of education: and therefore I may safely affirm that nothing (how *unusual* soever) is, under due regulations, improper to be *taught* in this place, which is proper for a gentleman to *learn*. But that a science, which distinguishes the criterions of right and wrong; which teaches to establish the one, and prevent, punish, or redress the other; which employs in its theory the noblest faculties of the soul, and exerts in its practice the cardinal virtues of the heart; a science, which is universal in its use and extent, accommodated to each individual, yet comprehending the whole community; that a science like this should ever have been deemed unnecessary to be studied in an university, is matter of astonishment and concern. Surely, if it were not before an object of academical knowledge, it was high time to make it one: and to those who can doubt the propriety of its reception among us, (if any such there be,) we may return an answer in their own way, that ethics are confessedly a branch of academical learning; and Aristotle *himself has said*, speaking of the laws of his own country, that jurisprudence, or the knowledge of those laws, is the principal and most perfect branch of ethics[e].

FROM a thorough conviction of this truth, our munificent benefactor, Mr. VINER, having employed above half a century in amassing materials for new modelling and rendering more commodious the rude study of the laws of the land, con-

c Lord chancellor Clarendon, in his dialogue of education, among his tracts, p. 325, appears to have been very solicitous, that it might be made a "part of the ornament of our "learned academies, to teach the qualities of "riding, dancing, and fencing, at those hours "when more serious exercises should be intermitted."

d By accepting in full convocation the remainder of Lord Clarendon's history from his noble descendants, on condition to apply the profits arising from its publication to the establishment of a *manage* in the university.

e Τελεια μαλιστα αρετη, ὁ τι της τελειας αρετης χρησις εστι. *Ethic. ad Nicomach. l. 5. c. 3.*

signed both the plan and execution of these his public-spirited designs to the wisdom of his parent university. Resolving to dedicate his learned labours "to the benefit of posterity and the perpetual service of his country[f]," he was sensible he could not perform his resolution in a better and more effectual manner, than by extending to the youth of this place, those assistances of which he so well remembered and so heartily regretted the want. And the sense, which the university has entertained of this ample and most useful benefaction, must appear beyond a doubt, from their gratitude in receiving it with all possible marks of esteem[g]; from their alacrity and unexampled despatch in carrying it into execution[h]; and, above all, from the laws and constitutions by which they have effectually guarded it from the neglect and abuse to which such institutions are liable[i]. We have

f See the preface to the eighteenth volume of his abridgment.

g Mr. Viner is enrolled among the public benefactors of the university by decree of convocation.

h Mr. Viner died June 5, 1756. His effects were collected and settled, near a volume of his work printed, almost the whole disposed of, and the accounts made up, in a year and a half from his decease, by the very diligent and worthy administrators with the will annexed, (Dr. West and Dr. Good of Magdalene, Dr. Whalley of Oriel, Mr. Buckler of All Souls, and Mr. Betts of University college,) to whom that care was consigned by the university. Another half year was employed in considering and settling a plan of the proposed institution, and in framing the statutes thereupon, which were finally confirmed by convocation on the 3d of July 1758. The professor was elected on the 20th of October following, and two scholars on the succeeding day. And, lastly, it was agreed at the annual audit in 1761, to establish a fellowship; and a fellow was accordingly elected in January following. The residue of this fund, arising from the sale of Mr. Viner's abridgment, will probably be sufficient hereafter to found another fellowship and scholarship, or three more scholarships, as shall be thought most expedient.

i The statutes are in substance as follows.

1. That the accounts of this benefaction be separately kept, and annually audited by the delegates of accounts and professor, and afterwards reported to convocation.

2. That a professorship of the laws of England be established, with a salary of two hundred pounds *per annum*; the professor to be elected by convocation, and to be at the time of his election at least a master of arts or bachelor of civil law in the university of Oxford, of ten years standing from his matriculation; and also a barrister at law of four years standing at the bar.

3. That such professor (by himself, or by deputy to be previously approved by convocation) do read one solemn public lecture on the laws of England, and in the English language, in every academical term, at certain stated times previous to the commencement of the common law term; or forfeit twenty pounds for every omission to Mr. Viner's

seen an universal emulation, who best should understand, or most faithfully pursue, the designs of our generous patron: and with pleasure we recollect, that those who are most distinguished by their quality, their fortune, their station, their learning, or their experience, have appeared the most

general fund: and also (by himself, or by deputy to be approved if occasional, by the vice-chancellor and proctors; or, if permanent, both the cause and the deputy to be annually approved by convocation) do yearly read one complete course of lectures on the laws of England, and in the English language, consisting of sixty lectures at the least; to be read during the university term time, with such proper intervals that not more than four lectures may fall within any single week: that the professor do give a month's notice of the time when the course is to begin, and do read *gratis* to the scholars of Mr. Viner's foundation; but may demand of other auditors such gratuity as shall be settled from time to time by decree of convocation, and that for every of the said sixty lectures omitted, the professor, on complaint made to the vice-chancellor within the year, do forfeit forty shillings to Mr. Viner's general fund; the proof of having performed his duty to lie upon the said professor.

4. That every professor do continue in his office during life, unless in case of such misbehaviour as shall amount to bannition by the university statutes; or unless he deserts the profession of the law by betaking himself to another profession; or unless, after one admonition by the vice-chancellor and proctors for notorious neglect, he is guilty of another flagrant omission; in any of which cases he be deprived by the vice-chancellor, with consent of the house of convocation.

5. That such a number of fellowships with a stipend of fifty pounds *per annum*, and scholarships with a stipend of thirty pounds, be established, as the convocation shall from time to time ordain, according to the state of Mr. Viner's revenues.

6. That every fellow be elected by convocation, and at the time of election be unmarried, and at least a master of arts or bachelor of civil law, and a member of some college or hall in the university of Oxford; the scholars of this foundation, or such as have been scholars, (if qualified and approved of by convocation,) to have the preference: that if not a barrister when chosen, he be called to the bar within one year after his election; but do reside in the university two months in every year, or in case of non-residence do forfeit the stipend of that year to Mr. Viner's general fund.

7. That every scholar be elected by convocation, and at the time of election be unmarried, and a member of some college or hall in the university of Oxford, who shall have been matriculated twenty-four calender months at the least; that he do take the degree of bachelor of civil law with all convenient speed (either proceeding in arts or otherwise); and previous to his taking the same, between the second and eighth year from his matriculation, be bound to attend two courses of the professor's lectures, to be certified under the professor's hand; and within one year after taking the same to be called to the bar; that he do annually reside six months till he is of four years standing, and four months from that time till he is master of arts or bachelor of civil law; after which he be bound to reside two months in every year; or in case of non-residence, do forfeit the stipend of that year to Mr. Viner's general fund.

8. That the scholarships do become void in case of non-attendance on the professor, or not taking the degree of bachelor of civil

zealous to promote the success of Mr. Viner's establishment.

THE advantages that might result to the science of the law itself, when a little more attended to in these seats of knowledge, perhaps, would be very considerable. The leisure and abilities of the learned in these retirements might either suggest expedients, or execute those dictated by wiser heads[k], for improving its method, retrenching its superfluities, and reconciling the little contrarieties, which the practice of many centuries will necessarily create in any human system: a task, which those, who are deeply employed in business and the more active scenes of the profession, can hardly condescend to engage in. And as to the interest, or (which is the same) the reputation of the universities themselves, I may venture to pronounce, that if ever this study should arrive to any tolerable perfection either here or at Cambridge, the nobility and gentry of this kingdom would not shorten their residence upon this account, nor perhaps entertain a worse opinion of the benefits of academical education. Neither should it be considered as a matter of light

law, being duly admonished so to do by the vice-chancellor and proctors; and that both fellowships and scholarships do expire at the end of ten years after each respective election; and become void in case of gross misbehaviour, non-residence for two years together, marriage, not being called to the bar within the time before limited, (being duly admonished so to be by the vice-chancellor and proctors,) or deserting the profession of the law by following any other profession: and that in any of these cases the vice-chancellor, with consent of convocation, do declare the place actually void.

9. That in case of any vacancy of the professorship, fellowships, or scholarships, the profits of the current year be rateably divided between the predecessor, or his representatives, and the successor; and that a new election be had within one month afterwards, unless by that means the time of election shall fall within any vacation, in which case it be deferred to the first week in the next full term. And that before any convocation shall be held for such election, or for any other matter relating to Mr. Viner's benefaction, ten days public notice be given to each college and hall of the convocation, and the cause of convoking it.

k See lord Bacon's proposals and offer of a digest.

importance, that while we thus extend the *pomoeria* of university learning, and adopt a new tribe of citizens [31] within these philosophical walls, we interest a very numerous and very powerful profession in the preservation of our rights and revenues.

For I think it past dispute that those gentlemen, who resort to the inns of court with a view to pursue the profession, will find it expedient (whenever it is practicable) to lay the previous foundations of this, as well as every other science, in one of our learned universities. We may appeal to the experience of every sensible lawyer, whether any thing can be more hazardous or discouraging than the usual entrance on the study of the law. A raw and unexperienced youth, in the most dangerous season of life, is transplanted on a sudden into the midst of allurements to pleasure, without any restraint or check but what his own prudence can suggest; with no public direction in what course to pursue his inquiries; no private assistance to remove the distresses and difficulties which will always embarrass a beginner. In this situation he is expected to sequester himself from the world, and by a tedious lonely process to extract the theory of law from a mass of undigested learning; or else by an assiduous attendance on the courts to pick up theory and practice together, sufficient to qualify him for the ordinary run of business. How little therefore is it to be wondered at, that we hear of so frequent miscarriages; that so many gentlemen of bright imaginations grow weary of so unpromising a search[1], and addict themselves wholly to amusements, or other less innocent pursuits; and that so many persons of moderate capacity confuse themselves at first setting out, and conti-

1 Sir Henry Spelman in the preface to his glossary, has given us a very lively picture of his own distress upon this occasion. "Emesit "me mater Londinum, juris nostri capessendi "gratia; cujus cum vestibulum salutassem, "reperissemque linguam peregrinam, dialec- "tum barbaram, methodum inconcinnam, "molem non ingentem solum sed perpetuis "humeris sustinendam, exoidit mihi (fateor) "animus, etc."

nue ever dark and puzzled during the remainder of their lives!

THE evident want of some assistance in the rudiments of legal knowledge has given birth to a practice, which, if ever it had grown to be general, must have proved of extremely pernicious consequence. I mean the custom by [32] some so very warmly recommended, of dropping all liberal education, as of no use to students in the law: and placing them, in its stead, at the desk of some skilful attorney; in order to initiate them early in all the depths of practice, and render them more dextrous in the mechanical part of business. A few instances of particular persons, (men of excellent learning, and unblemished integrity,) who, in spite of this method of education, have shone in the foremost ranks of the bar, have afforded some kind of sanction to this illiberal path to the profession, and biassed many parents, of short-sighted judgment, in its favour: not considering that there are some geniuses, formed to overcome all disadvantages, and that from such particular instances no general rules can be formed; nor observing, that those very persons have frequently recommended, by the most forcible of all examples, the disposal of their own offspring, a very different foundation of legal studies, a regular academical education. Perhaps too, in return, I could now direct their eyes to our principal seats of justice, and suggest a few hints, in favour of university learning[m]: but in these all who hear me, I know have already prevented me.

MAKING therefore due allowance for one or two shining exceptions, experience may teach us to foretell that a lawyer

m The four highest judicial offices were at that time filled by gentlemen, two of whom had been fellows of All Souls college; another, student of Christ Church; and the fourth a fellow of Trinity college, Cambridge (4).

(4) The two first were, Lord Northington and Lord Chief Justice Willes; the third, Lord Mansfield; and the fourth, Sir Thomas Clarke, Master of the Rolls.

thus educated to the bar, in subservience to attorneys and solicitors[n], will find he has begun at the wrong end. If practice be the whole he is taught, practice must also be the whole he will ever know: if he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him: *ita lex scripta est*[o] is the utmost his knowledge will arrive at: he must never aspire to form, and seldom expect to comprehend, any arguments drawn *a priori*, from the spirit of the laws and the natural foundations of justice.

[33] Nor is this all; for (as few persons of birth, or fortune, or even of scholastic education, will submit to the drudgery of servitude and the manual labour of copying the trash of an office) should this infatuation prevail to any considerable degree, we must rarely expect to see a gentleman of distinction or learning at the bar. And what the consequence may be, to have the interpretation and enforcement of the laws (which include the entire disposal of our properties, liberties, and lives) fall wholly into the hands of obscure or illiterate men, is matter of very public concern (5).

n See Kennet's Life of Somner, p. 67. o Ff. 40. 9. 12.

(5) The learning, which of late years has distinguished the bar, leaves little reason to apprehend that such will speedily be the degraded state of the laws of England. Our author's labours and example have contributed in no inconsiderable degree to rescue the profession from the reproaches of Lord Bolingbroke, whose sentiments upon the education of a barrister, correspond so fully with those of the learned judge, that they deserve to be annexed to this elegant dissertation on the study of the law.

"I might instance (says he) in other professions, the obligation men lie under of applying to certain parts of history; and I can hardly forbear doing it in that of the law, in its nature the noblest and most beneficial to mankind, in its abuse and debasement the most sordid and the most pernicious. A lawyer now is nothing more, I speak of ninety-nine in a hundred at least, to use some of Tully's words, *nisi leguleius quidem cautus, et acutus præco actionum, canter*

THE inconveniences here pointed out can never be effectually prevented, but by making academical education a previous step to the profession of the common law, and at the same time making the rudiments of the law a part of academical education. For sciences are of a sociable disposition, and flourish best in the neighbourhood of each other: nor is there any branch of learning, but may be helped and improved by assistances drawn from other arts. If therefore the student in our laws hath formed both his sentiments and style, by perusal and imitation of the purest classical writers, among whom the historians and orators will best deserve his regard; if he can reason with precision, and separate argument from fallacy, by the clear simple rules of pure unsophisticated logic; if he can fix his attention, and steadily pursue truth through any the most intricate deduction, by the use of mathematical demonstrations; if he has enlarged his conceptions of nature and art, by a view of the several branches of genuine, experimental philosophy; if he has

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formularum, auceps syllabarum. But there have been lawyers that were orators, philosophers, historians: there have been Bacons and Clarendons. There will be none such any more, till in some better age true ambition, or the love of fame, prevails over avarice; and till men find leisure and encouragement to prepare themselves for the excercise of this profession, by climbing up to the *vantage ground*, so my Lord Bacon calls it, of science, instead of groveling all their lives below, in a mean but gainful application to all the little arts of chicane. Till this happen, the profession of the law will scarce deserve to be ranked among the learned professions; and whenever it happens, one of the vantage grounds to which men must climb is metaphysical, and the other, historical knowledge.

"They must pry into the secret recesses of the human heart, and become well acquainted with the whole moral world, that they may discover the abstract reason of all laws; and they must trace the laws of particular states, especially of their own, from the first rough sketches, to the more perfect draughts; from the first causes or occasions that produced them, through all the effects, good and bad, that they produced." (Stud. of Hist. p. 353, quarto edition.)

impressed on his mind the sound maxims of the law of nature, the best and most authentic foundation of human laws; if, lastly, he has contemplated those maxims reduced to a practical system in the laws of imperial Rome; if he has done this or any part of it, (though all may be easily done under as able instructors as ever graced any seats of learning,) a student thus qualified may enter upon the study of the law with incredible advantage and reputation.

[34] And if, at the conclusion, or during the acquisition of these accomplishments, he will afford himself here a year or two's farther leisure, to lay the foundation of his future labours in a solid scientifical method without thirsting too early to attend that practice which it is impossible he should rightly comprehend, he will afterwards proceed with the greatest ease, and will unfold the most intricate points with an intuitive rapidity and clearness.

I SHALL not insist upon such motives as might be drawn from principles of economy, and are applicable to particulars only: I reason upon more general topics. And therefore to the qualities of the head, which I have just enumerated, I cannot but add those of the heart; affectionate loyalty to the king, a zeal for liberty and the constitution, a sense of real honour, and well grounded principles of religion; as necessary to form a truly valuable English lawyer, a Hyde, a Hale, or a Talbot. And, whatever the ignorance of some, or unkindness of others, may have heretofore untruly suggested, experience will warrant us to affirm, that these endowments of loyalty and public spirit, of honour and religion, are no where to be found in more high perfection than in the two universities of this kingdom.

BEFORE I conclude, it may perhaps be expected, that I lay before you a short and general account of the method I propose to follow, in endeavouring to execute the trust you have been pleased to repose in my hands. And in these solemn lectures, which are ordained to be read at the entrance of every term, (more perhaps to do public honour to this laud-

able institution, than for the private instruction of individuals[p],) I presume it will best answer the intent of our benefactor and the expectation of this learned body, if I attempt to illustrate at times such detached titles of the law, as are the most easy to be understood, and most capable of historical or critical ornament. But in reading the complete course, which is annually consigned to my care, a more regular method will be necessary; and, till a better is proposed, I shall take the liberty to follow the same [35] that I have already submitted to the public[q]. To fill up and finish that outline with propriety and correctness, and to render the whole intelligible to the uninformed minds of beginners, (whom we are too apt to suppose acquainted with terms and ideas, which they never had opportunity to learn,) this must be my ardent endeavour, though by no means my promise, to accomplish. You will permit me however very briefly to describe, rather what I conceive an academical expounder of the laws should do, than what I have ever known to be done.

He should consider his course as a general map of the law, marking out the shape of the country, its connexions and boundaries, its greater divisions and principal cities: it is not his business to describe minutely the subordinate limits, or to fix the longitude and latitude of every inconsiderable hamlet. His attention should be engaged, like that of the readers in Fortescue's inns of chancery, "in tracing out the "originals and as it were the elements of the law." For if, as Justinian[r] has observed, the tender understanding of the

p See Lowth's Oratio Crewiana, p. 365.

q The analysis of the laws of England, first published A. D. 1756, and exhibiting the order and principal divisions of the ensuing Commentaries; which were originally submitted to the university in a private course of lectures, A. D. 1753.

r Incipientibus nobis exponere jura populi Romani, ita videntur tradi posse commodissime, si prima levi ac simplici via singula tradantur: alioqui, si statim ab initio rudem adhuc et infirmum animum studiosi multitudine ac varietate rerum oneraverimus, duorum alterum, aut desertorem studiorum efficiemus, aut cum magno labore, saepe etiam cum diffidentia (quae plerumque juvenes avertit) actos ad id perducemus, ad quod, leviore via ducti, sine magno labore, et sine ulla diffidentia maturius perduci potuisset. Inst. I. 1. 2.

student be loaded at the first with a multitude and variety of matter, it will either occasion him to desert his studies, or will carry him heavily through them, with much labour, delay, and despondence. These originals should be traced to their fountains, as well as our distance will permit; to the customs of the Britons and Germans, as recorded by Cæsar and Tacitus; to the codes of the northern nations on the continent, and more especially to those of our own Saxon princes; to the rules of the Roman law either left here in the days of Papinian, or imported by Vacarius and [36] his followers; but above all, to that inexhaustible reservoir of legal antiquities and learning, the feodal law, or, as Spelman[s] has entitled it, the law of nations in our western orb. These primary rules and fundamental principles should be weighed and compared with the precepts of the law of nature, and the practice of other countries; should be explained by reasons, illustrated by examples, and confirmed by undoubted authorities; their history should be deduced, their changes and revolutions observed, and it should be shewn how far they are connected with, or have at any time been affected by, the civil transactions of the kingdom.

A PLAN of this nature, if executed with care and ability, cannot fail of administering a most useful and rational entertainment to students of all ranks and professions; and yet it must be confessed that the study of the laws is not merely a matter of amusement; for, as a very judicious writer[t] has observed upon a similar occasion, the learner "will be considerably disappointed, if he looks for entertainment without the expense of attention." An attention, however, not greater than is usually bestowed in mastering the rudiments of other sciences, or sometimes in pursuing a favourite recreation or exercise. And this attention is not equally necessary to be exerted by every student upon every occasion. Some branches of the law, as the formal process of civil suits, and the subtle distinctions incident to landed pro-

[s] Of Parliaments, 87. [t] Dr. Taylor's pref. to Elem. of civil law.

perty, which are the most difficult to be thoroughly understood, are the least worth the pains of understanding, except to such gentlemen as intend to pursue the profession. To others I may venture to apply, with a slight alteration, the words of Sir John Fortescue[n], when first his royal pupil determines to engage in this study. "It will not be necessary for a gentleman, as such, to examine with a close application the critical niceties of the law. It will fully be sufficient, and he may well enough be denominated a lawyer, if "under the instruction of a master he traces up the principles "and grounds of the law, even to their original elements. Therefore in a very short period, and with [37] "very little labour, he may be sufficiently informed in "the laws of his country, if he will but apply his mind in "good earnest to receive and apprehend them. For, though "such knowledge as is necessary for a judge is hardly to "be acquired by the lucubrations of twenty years, yet, "with a genius of tolerable perspicacity, that knowledge "which is fit for a person of birth or condition may be "learned in a single year, without neglecting his other "improvements."

To the few therefore (the very few I am persuaded) that entertain such unworthy notions of an university, as to suppose it intended for mere dissipation of thought; to such as mean only to while away the awkward interval from childhood to twenty-one, between the restraints of the school and the licentiousness of politer life, in a calm middle state of mental and of moral inactivity; to these Mr. Viner gives no invitation to an entertainment which they never can relish. But to the long and illustrious train of noble and ingenuous youth, who are not more distinguished among us by their birth and possessions, than by the regularity of their conduct and their thirst after useful knowledge, to these our benefactor has consecrated the fruits of a long and laborious life, worn out in the duties of his calling; and will joyfully reflect (if such reflections can be now the employment of his

n De laud. Leg. c. 8,

thoughts) that he could not more effectually have benefited posterity, or contributed to the service of the public, than by founding an institution which may instruct the rising generation in the wisdom of our civil polity, and inspire them with a desire to be still better acquainted with the laws and constitution of their country (6).

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(6) It is remarkable that the celebrated historian Mr. Gibbon, animadverting freely upon the lectures and institutions of Oxford, speaks only of the Vinerian professorship with respect; for, after noticing the establishment of the riding-school, he adds, "the Vinerian "professorship is of far more serious importance. The laws of his "country are the first science of an Englishman of rank and fortune, "who is called to be a magistrate, and may hope to be a legislator. "This judicious institution was coldly entertained by the graver doctors, "who complained (I have heard the complaint), that it would take the "young people from their books; but Mr. Viner's benefaction is not "unprofitable, since it has at least produced the excellent Commentaries of Sir William Blackstone." *Gibbon's Life*, p. 53. And in another part, having stated his inducements for bestowing attention upon new publications of merit, he tells us, "a more respectable motive may be "assigned for the third perusal of Blackstone's Commentaries, and a "copious and critical abstract of that English work was my first serious production in my native language." p. 141. Such, it may be observed, are even the remote consequences of every liberal and literary institution, that Viner's Abridgment may have contributed in no inconsiderable degree to the elegance and perspicuity of the Decline and Fall of the Roman Empire.

SECTION THE SECOND.

OF THE NATURE OF LAWS IN GENERAL.

LAW, in its most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations. And it is that rule of action, which is prescribed by some superior, and which the inferior is bound to obey.

THUS when the supreme being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. When he put that matter into motion, he established certain laws of motion, to which all moveable bodies must conform. And, to descend from the greatest operations to the smallest, when a workman forms a clock, or other piece of mechanism, he establishes at his own pleasure certain arbitrary laws for its direction; as that the hand shall describe a given space in a given time; to which law as long as the work conforms, so long it continues in perfection, and answers the end of its formation.

IF we farther advance, from mere inactive matter to vegetable and animal life, we shall find them still governed by laws; more numerous indeed, but equally fixed and invariable. The whole progress of plants, from the seed to the root, and from thence to the seed again; the method of animal nutrition, digestion, secretion, and all other branches of vital economy; are not left to chance, or the will of the crea-

ture itself, but are performed in a wondrous involuntary manner, and guided by unerring rules laid down by the great creator.

THIS then is the general signification of law, a rule of action dictated by some superior being: and, in those creatures that have neither the power to think, nor to will, such laws must be invariably obeyed, so long as the creature itself subsists, for its existence depends on that obedience. But laws, in their more confined sense (1), and in which it is our

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(1) This perhaps is the only sense in which the word *law* can be strictly used; for in all cases where it is not applied to human conduct, it may be considered as a metaphor, and in every instance a more appropriate term may be found. When it is used to express the operations of the Deity or Creator, it comprehends ideas very different from those which are included in its signification when it is applied to man, or his other creatures. The volitions of the Almighty are his laws, he had only to will γενεσθω φως και εγενετο. When we apply the word *law* to motion, matter, or the works of nature or of art, we shall find in every case, that with equal or greater propriety and perspicuity, we might have used the words *quality*, *property*, or *peculiarity*. We say that it is a law of motion, that a body put in motion *in vacuo* must for ever go forward in a straight line with the same velocity; that it is a law of nature, that particles of matter shall attract each other with a force that varies inversely as the square of the distance from each other; and mathematicians say, that a series of numbers observes a certain law, when each subsequent term bears a certain relation or proportion to the preceding term: but in all these instances we might as well have used the word *property* or *quality*, it being as much the property of all matter to move in a straight line, or to gravitate, as it is to be solid or extended; and when we say that it is the law of a series that each term is the square or square-root of the preceding term, we mean nothing more than that such is its property or peculiarity. And the word *law* is used in this sense in those cases only which are sanctioned by usage; as it would be thought a harsh expression to say, that it is a law that snow should be white, or that fire should burn. When a mechanic forms a clock, he establishes a model of it either in fact or in his mind, according to his pleasure; but if he should resolve that the wheels of his clock should move contrary to the usual rotation of similar pieces of mechanism,

present business to consider them, denote the rules, not of action in general, but of *human* action or conduct: that is, the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and freewill, is commanded to make use of those faculties in the general regulation of his behaviour.

MAN, considered as a creature, must necessarily be subject to the laws of his creator, for he is entirely a dependent being. A being, independent of any other, has no rule to pursue, but such as he prescribes to himself; but a state of dependence will inevitably oblige the inferior to take the will of him, on whom he depends, as the rule of his conduct: not indeed in every particular, but in all those points wherein his dependence consists. This principle therefore has more or less extent and effect, in proportion as the superiority of the one and the dependence of the other is greater or less, absolute or limited. And consequently, as man depends absolutely upon his maker for every thing, it is necessary that he should in all points conform to his maker's will.

THIS will of his maker is called the law of nature. For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with freewill to conduct himself in all parts of life, he laid down certain immutable laws of human nature, [40] whereby that freewill is in some degree regulated and

we could hardly with any propriety established by usage apply the term *law* to his scheme. When *law* is applied to any other object than man, it ceases to contain two of its essential ingredient ideas, viz. disobedience and punishment.

Hooker, in the beginning of his Ecclesiastical Polity, like the learned judge, has with incomparable eloquence interpreted *law* in its most general and comprehensive sense. And most writers who treat *law* as a science, begin with such an explanation. But the Editor, though it may seem presumptuous to question such authority, has thought it his duty to suggest these few observations upon the signification of the word *law*.

restrained, and gave him also the faculty of reason to discover the purport of those laws.

CONSIDERING the creator only as a being of infinite *power*, he was able unquestionably to have prescribed whatever laws he pleased to his creature, man, however unjust or severe. But as he is also a being of infinite *wisdom*, he has laid down only such laws as were founded in those relations of justice, that existed in the nature of things antecedent to any positive precept. These are the eternal, immutable laws of good and evil, to which the creator himself in all his dispensations conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions. Such among others are these principles: that we should live honestly(2), should hurt nobody, and should render to every one his due; to which three general precepts Justinian[a] has reduced the whole doctrine of law.

BUT if the discovery of these first principles of the law of nature depended only upon the due exertion of right reason, and could not otherwise be obtained than by a chain of metaphysical disquisitions, mankind would have wanted some inducement to have quickened their inquiries, and the greater part of the world would have rested content in mental indolence, and ignorance its inseparable companion. As therefore the creator is a being, not only of infinite *power*, and *wisdom*, but also of infinite *goodness*, he has been pleased

a Juris praecepta sunt haec, honeste vivere, alterum non laedere, suum cuique tribuere. Inst. I. 1. 3.

(2) It is rather remarkable that both Harris, in his translation of Justinian's Institutes, and the learned Commentator, whose profound learning and elegant taste in the classics no one will question, should render in English, *honestè vivere*, to live honestly. The language of the Institutes is far too pure to admit of that interpretation; and besides, our idea of honesty is fully conveyed by the words *suum cuique tribuere*. I should presume to think that *honestè vivere* signifies to live honourably, or with decorum, or *bienseance;* and that this precept was intended to comprize that class of duties, of which the violations are ruinous to society, not by immediate but remote consequences, as drunkenness, debauchery, profaneness, extravagance, gaming, &c.

so to contrive the constitution and frame of humanity, that we should want no other prompter to inquire after and pursue the rule of right, but only our own self-love, that universal principle of action. For he has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual connection of justice and human felicity, he has not perplexed the law of nature [41] with a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things, as some have vainly surmised; but has graciously reduced the rule of obedience to this one paternal precept, "that man should "pursue his own true and substantial happiness." This is the foundation of what we call ethics, or natural law. For the several articles into which it is branched in our systems, amount to no more than demonstrating, that this or that action tends to man's real happiness, and therefore very justly concluding that the performance of it is a part of the law of nature; or, on the other hand, that this or that action is destructive of man's real happiness, and therefore that the law of nature forbids it.

THIS law of nature being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this (3); and such of them as are valid derive all their

(3) Lord Chief Justice Hobart has also advanced, that even an act of Parliament made against natural justice, as to make a man a judge in his own cause, is void in itself, for *jura naturae sunt immutabilia*, and they are *leges legum*. (Hob. 87.) With deference to these high authorities, I should conceive that in no case whatever can a judge oppose his own opinion and authority to the clear will and declaration of the legislature. His province is to interpret and obey the mandates of the supreme power of the state. And if an act of parliament, if we could suppose such a case, should, like the

force, and all their authority, mediately or immediately, from this original.

But in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason: whose office it is to discover, as was before observed, what the law of nature directs in every circumstance of life; by considering, what method will tend the most effectually to our own substantial happiness. And if our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.

This has given manifold occasion for the benign interposition of divine providence; which, in compassion to the frailty, the imperfection, and the blindness of human reason, [42] hath been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature,

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edict of Herod, command all the children under a certain age to be slain, the judge ought to resign his office rather than be auxiliary to its execution; but it could only be declared void by the same legislative power by which it was ordained. If the judicial power were competent to decide that an act of parliament was void because it was contrary to natural justice, upon an appeal to the House of Lords this inconsistency would be the consequence, that as judges they must declare void, what as legislators they had enacted should be valid.

The learned judge himself declares in p. 91, "if the parliament will "positively enact a thing to be done which is unreasonable, I know of "no power in the ordinary forms of the constitution, that is vested with "authority to control it."

as they tend in all their consequences to man's felicity. But we are not from thence to conclude that the knowledge of these truths was attainable by reason, in its present corrupted state; since we find that, until they were revealed, they were hid from the wisdom of ages. As then the moral precepts of this law are indeed of the same original with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. Yet undoubtedly the revealed law is of infinitely more authenticity than that moral system, which is framed by ethical writers, and denominated the natural law. Because one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority: but, till then, they can never be put in any competition together.

Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these. There are, it is true, a great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty; but which are found necessary for the benefit of society to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy; for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the former. To instance in the case of murder: this is expressly forbidden by the divine, and demonstrably by the natural law; and from these prohibitions arises the true unlawfulness of this crime. Those human laws that annex a punishment to it, do not at all increase its moral guilt, or superadd any fresh obligation *in foro conscientiae* to [43] abstain from its perpetration. Nay, if any human law should allow or enjoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine. But with regard to matters that are

in themselves indifferent, and are not commanded or forbidden by those superior laws; such, for instance, as exporting of wool into foreign countries; here the inferior legislature has scope and opportunity to interpose, and to make that action unlawful which before was not so.

If man were to live in a state of nature, unconnected with other individuals, there would be no occasion for any other laws, than the law of nature (4), and the law of God. Neither could any other law possibly exist: for a law always supposes some superior who is to make it; and in a state of nature we are all equal, without any other superior but him who is the author of our being. But man was formed for society; and, as is demonstrated by the writers on this subject[b], is neither capable of living alone, nor indeed has the courage to do it. However, as it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many; and form separate states, commonwealths, and nations, entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a third kind of law to regulate this mutual intercourse called "the law of nations:" which, as none of these states will acknowledge a superiority in the other, cannot be dictated by any; but depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communi-

b Puffendorf, l. 7. c. 1. compared with Barbeyrac's commentary.

(4) The law of nature, or morality, which teaches the duty towards one's neighbour, would scarce be wanted in a solitary state, where man is unconnected with man. A state of nature, to which the laws of nature or of morals more particularly refer, must signify the state of men when they associate together previous to, or independent of, the institutions of regular government. The ideal equality of men in such a state no more precludes the idea of a law, than the supposed equality of subjects in a republic. The superior, who would prescribe and enforce the law in a state of nature, would be the collective force of the wise and good, as the superior in a perfect republic is a majority of the people, or the power to which the majority delegate their authority.

ties: in the construction also of which compacts we have no other rule to resort to, but the law of nature; being the only one to which all the communities are equally subject; and therefore the civil law[c] very justly observes, that *quod naturalis ratio inter omnes homines constituit, vocatur jus gentium.*

THUS much I thought it necessary to premise concerning the law of nature, the revealed law, and the law of nations, before I proceeded to treat more fully of the principal subject of this section, municipal or civil law; that is, the rule by which particular districts, communities, or nations are governed; being thus defined by Justinian[d], "*jus* "*civile est quod quisque sibi populus constituit.*" I call it *municipal* law, in compliance with common speech; for, though strictly that expression denotes the particular customs of one single *municipium* or free town, yet it may with sufficient propriety be applied to any one state or nation, which is governed by the same laws and customs. [44]

MUNICIPAL law, thus understood, is properly defined to be "a rule of civil conduct prescribed by the supreme power "in a state, commanding what is right and prohibiting what "is wrong (5)." Let us endeavour to explain its several properties, as they arise out of this definition.

c Ff. 1. 1. 9. d Inst. 1. 2. 1.

(5) Though the learned Judge treats this as a favourite definition, yet when it is examined, it will not perhaps appear so satisfactory, as the definition of civil or municipal law, or the law of the land, cited above from Justinian's Institutes; viz. *Quod quisque populus ipse sibi jus constituit, id ipsius proprium civitatis est, vocaturque jus civile, quasi jus proprium ipsius civitatis.*

A municipal law is completely expressed by the first branch of the definition, "A rule of civil conduct prescribed by the supreme power "in a state." And the latter branch, "commanding what is right "and prohibiting what is wrong," must either be superfluous, or convey a defective idea of a municipal law; for if right and wrong are referred to the municipal law itself, then, whatever it commands

AND, first, it is a *rule:* not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal. Therefore a particular act of the legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only, and has no relation to the community in general;

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is right, and what it prohibits is wrong, and this clause would be insignificant tautology. But if right and wrong are to be referred to the law of nature, then the definition will become deficient or erroneous; for though the municipal law may seldom or never command what is wrong, yet in ten thousand instances it forbids what is right. It forbids an unqualified person to kill a hare or a partridge; it forbids a man to exercise a trade without having served seven years as an apprentice; it forbids a man to keep a horse or a servant without paying the tax. Now all these acts were perfectly right before the prohibition of the municipal law. Though the latter part of Cicero's definition of a law of nature is something similar, yet, when it is considered, it will be found to be free from the objections here suggested. *Lex est summa ratio insita à naturâ quæ jubet ea, quæ facienda sunt prohibetque contraria.* Cic. de Leg. lib. i. c. 6.

The description of law given by Demosthenes is perhaps the most perfect and satisfactory that can be conceived: Οἱ δὲ νόμοι τὸ δίκαιον καὶ τὸ καλὸν καὶ τὸ συμφέρον βούλονται, καὶ τοῦτο ζητοῦσι. καὶ ἐπισδὰν εὑρεθῇ, κοινὸν τοῦτο πρόσταγμα ἀπέδειχθη, πᾶσιν ἴσον καὶ ὅμοιον. καὶ τοῦτ' ἔστι νόμος, ᾧ πάντας προσῆκει πείθεσθαι διὰ πολλά, καὶ μάλισθ', ὅ τι πᾶς ἐστι νόμος εὕρημα μὲν καὶ δῶρον θεῶν, δόγμα δ' ἀνδρῶν φρονίμων, ἐπανόρθωμα δὲ τῶν ἑκουσίων, καὶ ἀκουσίων ἁμαρτημάτων, πόλεως δὲ συνθήκη κοινὴ· καθ ἣν πᾶσι προσῆκει ζῆν τοῖς ἐν τῇ πόλει. "The de-"sign and object of laws is to ascertain what is just, honourable, and "expedient; and when that is discovered, it is proclaimed as a gene-"ral ordinance, equal and impartial to all. This is the origin of law, "which, for various reasons, all are under an obligation to obey; but "especially because all law is the invention and gift of Heaven, the "resolution of wise men, the correction of every offence, and the "general compact of the state; to live in conformity with which is "the duty of every individual in society." *Orat.* 1. *cont. Aristogit.*

it is rather a sentence than a law. But an act to declare that the crime of which Titius is accused shall be deemed high treason; this has permanency, uniformity, and universality, and therefore is properly a *rule*. It is also called a *rule*, to distinguish it from *advice* or *counsel*, which we are at liberty to follow or not, as we see proper, and to judge upon the reasonableness or unreasonableness of the thing advised: whereas our obedience to the *law* depends not upon *our approbation*, but upon the *maker's will*. Counsel is only matter of persuasion, law is matter of injunction; counsel acts only upon the willing, law upon the unwilling also.

[45] It is also called a *rule* to distinguish it from a *compact* or *agreement*; for a compact is a promise proceeding *from* us, law is a command directed *to* us. The language of a compact is, "I will, or will not, do this;" that of a law is, "thou shalt, or shalt not, do it." It is true there is an obligation which a compact carries with it, equal in point of conscience to that of a law; but then the original of the obligation is different. In compacts, we ourselves determine and promise what shall be done, before we are obliged to do it; in laws, we are obliged to act without ourselves determining or promising any thing at all. Upon these accounts law is defined to be "*a rule*."

Municipal law is also "a rule *of civil conduct*." This distinguishes municipal law from the natural, or revealed; the former of which is the rule of *moral* conduct, and the latter not only the rule of moral conduct, but also the rule of faith. These regard man as a creature, and point out his duty to God, to himself, and to his neighbour, considered in the light of an individual. But municipal or civil law regards him also as a citizen, and bound to other duties towards his neighbour, than those of mere nature and religion: duties, which he has engaged in by enjoying the benefits of the common union; and which amount to no more, than that he do contribute, on his part, to the subsistence and peace of the society.

IT is likewise "a rule *prescribed*." Because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. But the manner in which this notification is to be made, is matter of very great indifference. It may be notified by universal tradition and long practice, which supposes a previous publication, and is the case of the common law of England. It may be notified, *viva voce*, by officers appointed for that purpose, as is done with regard to proclamations, and such acts of parlia-
[46] ment as are appointed to be publicly read in churches and other assemblies. It may lastly be notified by writing, printing, or the like; which is the general course taken with all our acts of parliament. Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them up on high pillars, the more effectually to insnare the people. There is still a more unreasonable method than this, which is called making of laws *ex post facto*; when after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust[e]. All laws should be therefore made to

e Such laws among the Romans were denominated *privilegia* (6), or private laws, of which Cicero (de leg. 3. 19. and in his oration pro domo, 17.) thus speaks: "Vetant leges "sacratae, vetant duodecim tabulae, leges "privatis hominibus irrogari; id enim est "privilegium. Nemo unquam tulit, nihil est "crudelius, nihil pernicifius, nihil quod minus "haec civitas ferre possit."

(6) An *ex post facto* law may be either of a public or of a private nature: and when we speak generally of an *ex post facto* law,

commence *in futuro*, and be notified before their commencement; which is implied in the term "*prescribed*." But when this rule is in the usual manner notified, or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance, of what he *might* know, were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.

BUT farther: municipal law is "a rule of civil conduct "prescribed *by the supreme power in a state*." For legislature, as was before observed, is the greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite to the very essence of a law, that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other.

THIS will naturally lead us into a short inquiry con- [47] cerning the nature of society, and civil government; and the natural, inherent right that belongs to the sovereignty of a state, wherever that sovereignty be lodged, of making and enforcing laws.

THE only true and natural foundations of society are the wants and the fears of individuals. Not that we can believe, with some theoretical writers, that there ever was a time when there was no such thing as society, either natural or civil; and that, from the impulse of reason, and through a sense of their wants and weaknesses, individuals met together in a large plain, entered into an original contract, and chose the tallest man present to be their governor. This notion, of an actually existing unconnected state of nature, is too wild to be seriously admitted: and besides it is plainly contradictory to the revealed accounts of the primitive origin of mankind, and their preservation two thousand years afterwards; both which were effected by the means of single families. These formed the first natural society, among themselves; which, every day

we perhaps always mean a law which comprehends the whole community. The Roman *privilegia* seem to correspond to our bills of attainder, and bills of pains and penalties, which, though in their nature they are *ex post facto* laws, yet are seldom called so.

extending its limits, laid the first though imperfect rudiments of civil or political society: and when it grew too large to subsist with convenience in that pastoral state, wherein the patriarchs appear to have lived, it necessarily subdivided itself by various migrations into more. Afterwards, as agriculture increased, which employs and can maintain a much greater number of hands, migrations became less frequent: and various tribes, which had formerly separated, reunited again; sometimes by compulsion and conquest, sometimes by accident, and sometimes perhaps by compact. But though society had not its formal beginning from any convention of individuals, actuated by their wants and their fears; yet it is the *sense* of their weakness and imperfection that *keeps* mankind together; that demonstrates the necessity of this union: and that therefore is the solid and natural foundation, as well as the cement of civil society. And this is what we mean by the original contract of society; which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be
[48] understood and implied, in the very act of associating together: namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole, or, in other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community; without which submission of all it was impossible that protection could be certainly extended to any.

For when civil society is once formed, government at the same time results of course, as necessary to preserve and to keep that society in order. Unless some superior be constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a state of nature, without any judge upon earth to define their several rights, and redress their several wrongs. But, as all the members which compose this society were naturally equal,

it may be asked, in whose hands are the reins of government to be intrusted? To this the general answer is easy; but the application of it to particular cases has occasioned one half of those mischiefs, which are apt to proceed from misguided political zeal. In general, all mankind will agree that government should be reposed in such persons, in whom those qualities are most likely to be found, the perfection of which is among the attributes of him who is emphatically styled the supreme being; the three grand requisites, I mean of wisdom, of goodness, and of power: wisdom, to discern the real interest of the community; goodness, to endeavour always to pursue that real interest; and strength, or power, to carry this knowledge and intention into action. These are the natural foundations of sovereignty, and these are the requisites that ought to be found in every well constituted frame of government.

How the several forms of government we now see in the world at first actually began, is matter of great uncertainty, and has occasioned infinite disputes. It is not my business or intention to enter into any of them. However they began, or by what right soever they subsist, there is [49] and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside. And this authority is placed in those hands, wherein (according to the opinion of the founders of such respective states, either expressly given, or collected from their tacit approbation) the qualities requisite for supremacy, wisdom, goodness, and power, are the most likely to be found.

THE political writers of antiquity will not allow more than three regular forms of government; the first, when the sovereign power is lodged in an aggregate assembly consisting of all the free members of a community, which is called a democracy; the second, when it is lodged in a council, composed of select members, and then it is styled an aristocracy; the last, when it is intrusted in the hands of a single

person, and then it takes the name of a monarchy. All other species of government, they say, are either corruptions of, or reducible to, these three.

By the sovereign power, as was before observed, is meant the making of laws; for wherever that power resides, all others must conform to, and be directed by it, whatever appearance the outward form and administration of the government may put on. For it is at any time in the option of the legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases; by constituting one, or a few, or many executive magistrates: and all the other powers of the state must obey the legislative power in the discharge of their several functions, or else the constitution is at an end.

In a democracy, where the right of making laws resides in the people at large, public virtue, or goodness of intention is more likely to be found, than either of the other qualities of government. Popular assemblies are frequently foolish in their contrivance, and weak in their execution; but generally mean to do the thing that is right and just, and have always a degree of patriotism or public spirit. In [50] aristocracies there is more wisdom to be found, than in the other frames of government; being composed, or intended to be composed, of the most experienced citizens: but there is less honesty than in a republic, and less strength than in a monarchy. A monarchy is indeed the most powerful of any; for by the entire conjunction of the legislative and executive powers all the sinews of government are knit together, and united in the hand of the prince: but then there is imminent danger of his employing that strength to improvident or oppressive purposes.

Thus these three species of government have, all of them, their several perfections and imperfections. Democracies are usually the best calculated to direct the end of a law; aristocracies to invent the means by which that end shall be obtained; and monarchies to carry those means into execu-

tion. And the ancients, as was observed, had in general no idea of any other permanent form of government but these three: for though Cicero[f] declares himself of opinion, "*esse* "*optime constitutam rempublicam, quae ex tribus generibus* "*illis, regali, optimo, et populari, sit modice confusa;*" yet Tacitus treats this notion of a mixed government, formed out of them all, and partaking of the advantages of each, as a visionary whim, and one that, if effected, could never be lasting or secure[g].

But, happily for us of this island, the British constitution has long remained, and I trust will long continue, a standing exception to the truth of this observation. For, as with us the executive power of the laws is lodged in a single person, they have all the advantages of strength and despatch, that are to be found in the most absolute monarchy: and as the legislature of the kingdom is intrusted to three distinct powers, entirely independent of each other; first, the king; secondly, the lords spiritual and temporal, which is an aristocratical assembly of persons selected for their piety, their birth, their wisdom, their valour, or their property; and, thirdly, the house of commons, freely chosen by the people from among themselves, which makes it a kind of democracy; as this aggregate body, actuated by different springs, and attentive to different interests, composes the British parliament, and has the supreme disposal of every thing; there can no inconvenience be attempted by either of the three branches, but will be withstood by one of the other two; each branch being armed with a negative power, sufficient to repel any innovation which it shall think inexpedient or dangerous. [51]

Here then is lodged the sovereignty of the British constitution; and lodged as beneficially as is possible for society. For in no other shape could we be so certain of finding the three great qualities of government so well and so happily

[f] In his fragments de rep. l. 2.

[g] "Cunctas nationes et urbes populus aut "primores, aut singuli regunt: delecta ex his "et constituta reipublicae forma laudari faci- "lius quam evenire, vel, si evenit, haud diu- "turna esse potest." Ann. l. 4.

united. If the supreme power were lodged in any one of the three branches separately, we must be exposed to the inconveniences of either absolute monarchy, aristocracy, or democracy; and so want two of the three principal ingredients of good polity, either virtue, wisdom, or power. If it were lodged in any two of the branches; for instance, in the king and house of lords; our laws might be providently made, and well executed, but they might not always have the good of the people in view: if lodged in the king and commons, we should want that circumspection and mediatory caution, which the wisdom of the peers is to afford: if the supreme rights of legislature were lodged in the two houses only, and the king had no negative upon their proceedings, they might be tempted to encroach upon the royal prerogative, or perhaps to abolish the kingly office, and thereby weaken (if not totally destroy) the strength of the executive power. But the constitutional government of this island is so admirably tempered and compounded, that nothing can endanger or hurt it, but destroying the equilibrium of power between one branch of the legislature and the rest. For if ever it should happen that the independence of any one of the three should be lost, or that it should become subservient to the views of either of the other two, there
[52] would soon be an end of our constitution. The legislature would be changed from that, which (upon the supposition of an original contract, either actual or implied) is presumed to have been originally set up by the general consent and fundamental act of the society: and such a change, however effected, is according to Mr. Locke[h] (who perhaps carries his theory too far) at once an entire dissolution of the bands of government; and the people are thereby reduced to a state of anarchy, with liberty to constitute to themselves a new legislative power.

HAVING thus cursorily considered the three usual species of government, and our own singular constitution, selected

h On government, part 2. sec. 212.

and compounded from them all, I proceed to observe, that, as the power of making laws constitutes the supreme authority, so wherever the supreme authority in any state resides, it is the right of that authority to make laws; that is, in the words of our definition, *to prescribe the rule of civil action.* And this may be discovered from the very end and institution of civil states. For a state is a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together as one man. If it therefore is to act as one man, it ought to act by one uniform will. But, inasmuch as political communities are made up of many natural persons, each of whom has his particular will and inclination, these several wills cannot by any *natural* union be joined together, or tempered and disposed into a lasting harmony, so as to constitute and produce that one uniform will of the whole. It can therefore be no otherwise produced than by a *political* union; by the consent of all persons to submit their own private wills to the will of one man, or of one or more assemblies of men, to whom the supreme authority is entrusted: and this will of that one man, or assemblage of men, is in different states, according to their different constitutions, understood to be *law.*

THUS far as to the *right* of the supreme power to make laws; but farther, it is its *duty* likewise. For since the respective members are bound to conform themselves [53] to the will of the state, it is expedient that they receive directions from the state declaratory of that its will. But, as it is impossible, in so great a multitude, to give injunctions to every particular man, relative to each particular action, it is therefore incumbent on the state to establish general rules, for the perpetual information and direction of all persons in all points, whether of positive or negative duty. And this, in order that every man may know what to look upon as his own, what as another's; what absolute and what relative duties are required at his hands; what is to be esteemed honest,

dishonest, or indifferent; what degree every man retains of his natural liberty; what he has given up as the price of the benefits of society; and after what manner each person is to moderate the use and exercise of those rights which the state assigns him, in order to promote and secure the public tranquillity.

FROM what has been advanced, the truth of the former branch of our definition, is (I trust) sufficiently evident; that "*municipal law is a rule of civil conduct prescribed by the supreme power in a state.*" I proceed now to the latter branch of it; that it is a rule so prescribed, "*commanding what is right, and prohibiting what is wrong.*"

NOW, in order to do this completely, it is first of all necessary that the boundaries of right and wrong be established and ascertained by law. And when this is once done, it will follow of course that it is likewise the business of the law, considered as a rule of civil conduct, to enforce these rights and to restrain or redress these wrongs. It remains, therefore, only to consider in what manner the law is said to ascertain the boundaries of right and wrong; and the methods which it takes to command the one and prohibit the other.

FOR this purpose every law may be said to consist of several parts: one, *declaratory;* whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined [54] and laid down: another, *directory;* whereby the subject is instructed and enjoined to observe those rights, and to abstain from the commission of those wrongs: a third, *remedial;* whereby a method is pointed out to recover a man's private rights, or redress his private wrongs: to which may be added a fourth, usually termed the *sanction*, or *vindicatory* branch of the law; whereby it is signified what evil or penalty shall be incurred by such as commit any public wrongs, and transgress or neglect their duty.

WITH regard to the first of these the *declaratory* part of the municipal law, this depends not so much upon the law

of revelation or of nature, as upon the wisdom and will of the legislator. This doctrine, which before was slightly touched, deserves a more particular explication. Those rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture. Neither do divine or natural *duties* (such as, for instance, the worship of God, the maintenance of children, and the like) receive any stronger sanction from being also declared to be duties by the law of the land. The case is the same as to crimes and misdemesnors, that are forbidden by the superior laws, and therefore styled *mala in se*, such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature. For that legislature in all these cases acts only, as was before observed, in subordination to the great lawgiver, transcribing and publishing his precepts. So that, upon the whole, the declaratory part of the municipal law has no force or operation at all, with regard to actions that are naturally and intrinsically right or wrong.

But, with regard to things in themselves indifferent, [55] the case is entirely altered. These become either right or wrong, just or unjust, duties or misdemesnors, according as the municipal legislator sees proper, for promoting the welfare of the society, and more effectually carrying on the purposes of civil life. Thus our own common law has declared, that the goods of the wife do instantly upon marriage become the property and right of the husband; and our statute law has declared all monopolies a public offence: yet that right, and this offence, have no foundation in nature; but are merely created by the law, for the purposes of civil society. And sometimes, where the thing itself has its rise from the law of

nature, the particular circumstances and mode of doing it become right or wrong, as the laws of the land shall direct. Thus, for instance, in civil duties; obedience to superiors is the doctrine of revealed as well as natural religion: but who those superiors shall be, and in what circumstances, or to what degrees they shall be obeyed, it is the province of human laws to determine. And so, as to injuries or crimes, it must be left to our own legislature to decide, in what cases the seising another's cattle shall amount to a trespass or a theft; and where it shall be a justifiable action, as when a landlord takes them by way of distress for rent.

THUS much for the *declaratory* part of the municipal law: and the *directory* stands much upon the same footing; for this virtually includes the former, the declaration being usually collected from the direction. The law that says, "thou shalt not steal," implies a declaration that stealing is a crime. And we have seen[i] that, in things naturally indifferent, the very essence of right and wrong depends upon the direction of the laws to do or to omit them.

THE *remedial* part of the law is so necessary a consequence of the former two, that laws must be very vague and
[56] imperfect without it. For in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law. When, for instance, the *declaratory* part of the law has said, "that the field "or inheritance, which belonged to Titius's father, is vested by "his death in Titius;" and the *directory* part has "forbidden "any one to enter on another's property, without the leave of "the owner:" if Gaius after this will presume to take possession of the land, the *remedial part* of the law will then interpose its office; will make Gaius restore the possession to Titius, and also pay him damages for the invasion.

i See page 43.

WITH regard to the *sanction* of laws, or the evil that may attend the breach of public duties; it is observed, that human legislators have for the most part chosen to make the sanction of their laws rather *vindicatory* than *remuneratory*, or to consist rather in punishments, than in actual particular rewards. Because, in the first place, the quiet enjoyment and protection of all our civil rights and liberties, which are the sure and general consequence of obedience to the municipal law, are in themselves the best and most valuable of all rewards. Because also, were the exercise of every virtue to be enforced by the proposal of particular rewards, it were impossible for any state to furnish stock enough for so profuse a bounty. And farther, because the dread of evil is a much more forcible principle of human actions than the prospect of good[k]. For which reasons, though a prudent bestowing of rewards is sometimes of exquisite use, yet we find that those civil laws, which enforce and enjoin our duty, do seldom, if ever, propose any privilege or gift to such as obey the law; but do constantly come armed with a penalty denounced against transgressors, either expressly defining the nature and quantity of the punishment, or else leaving it to the discretion of the judges, and those who are entrusted with the care of putting the laws in execution.

OF all the parts of a law the most effectual is the [57] *vindicatory*. For it is but lost labour to say, "do this, "or avoid that," unless we also declare, "this shall be the "consequence of your non-compliance." We must therefore observe that the main strength and force of a law consists in the penalty annexed to it. Herein is to be found the principal obligation of human laws.

LEGISLATORS and their laws are said to *compel* and *oblige*; not that by any natural violence they so constrain a man, as to render it impossible for him to act otherwise than as they direct, which is the strict sense of obligation: but because, by declaring and exhibiting a penalty against offenders, they

k Locke, Hum. Und. b. 2. c. 21.

bring it to pass that no man can easily choose to transgress the law; since, by reason of the impending correction, compliance is in a high degree preferable to disobedience. And, even where rewards are proposed as well as punishments threatened, the obligation of the law seems chiefly to consist in the penalty: for rewards, in their nature, can only *persuade* and *allure*; nothing is *compulsory* but punishment.

It is true, it hath been holden and very justly, by the principal of our ethical writers, that human laws are binding upon men's consciences. But if that were the only, or most forcible obligation, the good only would regard the laws, and the bad would set them at defiance. And, true as this principle is, it must still be understood with some restriction. It holds, I apprehend, as to *rights*; and that, when the law has determined the field to belong to Titius, it is matter of conscience no longer to withhold or to invade it. So also in regard to *natural duties*, and such offences as are *mala in se*: here we are bound in conscience, because we are bound by superior laws, before those human laws were in being, to perform the one and abstain from the other. But in relation to those laws which enjoin only *positive duties*, and forbid only such things as are not *mala in se* but *mala*
[58] *prohibita* merely, without any intermixture of moral guilt, annexing a penalty to non-compliance[1], here I apprehend conscience is no farther concerned, than by directing a submission to the penalty, in case of our breach of those laws: for otherwise the multitude of penal laws in a state would not only be looked upon as an impolitic, but would also be a very wicked thing; if every such law were a snare for the conscience of the subject. But in these cases the alternative is offered to every man; "either abstain from this, or submit to such a penalty:" and his conscience will be clear, whichever side of the alternative he thinks proper to embrace. Thus, by the statutes for preserving the game, a penalty is denounced against every unqualified person that kills a hare, and

1 See Vol. II. page 420.

against every person who possesses a partridge in August. And so, too, by other statutes, pecuniary penalties are inflicted for exercising trades without serving an apprenticeship thereto, for not burying the dead in woollen, for not performing statute-work on the public roads, and for innumerable other positive misdemesnors. Now these prohibitory laws do not make the transgression a moral offence, or sin: the only obligation in conscience is to submit to the penalty, if levied. It must however be observed, that we are here speaking of laws that are simply and purely penal, where the thing forbidden or enjoined is wholly a matter of indifference, and where the penalty inflicted is an adequate compensation for the civil inconvenience supposed to arise from the offence(7). But where disobedience to the law involves in it also any degree of public mischief or private injury, there it falls within our former distinction, and is also an offence against conscience[m].

[m] Lex pure poenalis obligat tantum ad poenam, non item ad culpam: lex poenalis mixta et ad culpam obligat, et ad poenam. (Sanderson de conscient. obligat. prael. viii. sec. 17. 24.)

(7) This is a doctrine to which the Editor cannot subscribe. It is an important question, and deserves a more extensive discussion than can conveniently be introduced into a note. The solution of it may not only affect the quiet of the minds of conscientious men, but may be the foundation of arguments and decisions in every branch of the law. To form a true judgment upon this subject, it is necessary to take into consideration the nature of moral and positive laws. The principle of both is the same, viz. utility, or the general happiness and true interests of mankind,

Atque ipsa utilitas justi prope mater et aequi.

But the necessity of one set of laws is seen prior to experience; of the other, posterior. A moral rule is such, that every man's reason (if not perverted) dictates it to him as soon as he associates with other men. It is universal, and must be the same in every part of the world. Do not kill, do not steal, do not violate promises, must be equally obligatory in England, Lapland, Kamtschatka, and New Holland. But

I HAVE now gone through the definition laid down of a municipal law; and have shewn that it is "a rule—of civil "conduct—prescribed—by the supreme power in a state—

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a positive law is discovered by experience to be useful and necessary only to men in certain districts, or under peculiar circumstances. It is said that it is a capital crime in Holland to kill a stork, because that animal destroys the vermin which would undermine the dykes or banks, upon which the existence of the country depends. This may be a wise law in Holland; but the life of a stork in England would probably be of no more value than that of a sparrow, and such a law would be useless and cruel in this country.

By the laws of nature and reason, every man is permitted to build his house in any manner he pleases; but from the experience of the destructive effects of fire in London, the legislature with great wisdom enacted that all party-walls should be of a certain thickness; and it is somewhat surprising that they did not extend this provident act to all other great towns. (14 Geo. 3. c. 78.)

It was also discovered by experience, that dreadful consequences ensued, when sea-faring people, who returned from distant countries infected with the plague, were permitted immediately to come on shore, and mix with the healthy inhabitants; it was therefore a wise and merciful law, though restrictive of natural right and liberty, which compelled such persons to be purified from all contagion by performing quarantine. (4 Vol. 161.)

He who, by the breach of these positive laws, introduces conflagration and pestilence, is surely guilty of a much greater crime than he is who deprives another of his purse or his horse.

The laws against smuggling are entirely *juris positivi;* but the criminality of actions can only be measured by their consequences; and he who saves a sum of money by evading the payment of a tax, does exactly the same injury to society as he who steals so much from the treasury; and is therefore guilty of as great immorality, or as great an act of dishonesty. Or smuggling has been compared to that species of fraud which a man would practise who should join with his friends in ordering a dinner at a tavern, and after the festivity and gratifications of the day, should steal away, and leave his companions to pay his share of the reckoning. Usury and simony are entirely of a positive nature, yet few men would have a conscience quite at ease, who had been guilty of either.

"commanding what is right, and prohibiting what is wrong:" in the explication of which I have endeavoured to interweave a few useful principles, concerning the nature of civil government, and the obligation of human laws. Be-

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Punishment or penalties are never intended as an equivalent or a composition for the commission of the offence; but they are that degree of pain or inconvenience, which are supposed to be sufficient to deter men from introducing that greater degree of inconvenience, which would result to the community from the general permission of that act, which the law prohibits. It is no recompense to a man's country for the consequences of an illegal act, that he should afterwards be whipped, or should stand in the pillory, or lie in a gaol. But in positive laws, as in moral rules, it is equally false that *omnia peccata paria sunt.* If there are laws, such perhaps as the game-laws, which in the public opinion produce little benefit or no salutary effect to society, a conscientious man will feel perhaps no further regard for the observance of them, than from the consideration that his example may encourage others to violate those laws which are more highly beneficial to the community. Indeed, the last sentence of the learned Judge upon this subject, is an answer to his own doctrine; for the disobedience of any law in existence, must be presumed to involve in it either public mischief or private injury. It is related of Socrates, that he made a promise with himself to observe the laws of his country; but this is nothing more than what every good man ought both to promise and to perform: and he ought to promise still farther, that he will exert all his power to compel others to obey them. As the chief design of established government is the prevention of crimes and the enforcement of the moral duties of man, obedience to that government necessarily becomes one of the highest of moral obligations: and the principle of moral and positive laws being precisely the same, they become so blended, that the discrimination between them is frequently difficult or impracticable, or, as the Author of the Doctor and Student has expressed it with beautiful simplicity, "In "every law positive well-made, is somewhat of the law of reason and "of the law of God; and to discern the law of God and the law of "reason from the law positive, is very hard." 1 *Dial.* c. 4.

fore I conclude this section, it may not be amiss to add a few observations concerning the *interpretation* of laws.

When any doubt arose upon the construction of the Roman laws, the usage was to state the case to the emperor in writing, and take his opinion upon it. This was certainly a bad method of interpretation. To interrogate the legislature to decide particular disputes, is not only endless, but affords great room for partiality and oppression. The answers of the emperor were called his rescripts, and these had in succeeding cases the force of perpetual laws; though they ought to be carefully distinguished, by every rational civilian, from those general constitutions, which had only the nature of things for their guide. The emperor Macrinus, as his historian Capitolinus informs us, had once resolved to abolish these rescripts, and retain only the general edicts: he could not bear that the hasty and crude answers of such princes as Commodus and Caracalla should be reverenced as laws. But Justinian thought otherwise[n], and he has preserved them all. In like manner the canon laws, or decretal epistles of the popes, are all of them rescripts in the strictest sense. Contrary to all true forms of reasoning, they argue from particulars to generals.

The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of the law. Let us take a short view of them all.

1. Words are generally to be understood in their usual and most known signification; not so much regarding the
[60] propriety of grammar, as their general and popular use. Thus the law mentioned by Puffendorf[o], which forbad a

[n] Inst. 1. 2. 6. [o] L. of N. and N. b. 12. 3.

layman to *lay hands* on a priest, was adjudged to extend to him, who had hurt a priest with a weapon. Again; terms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade, and science. So in the act of settlement, where the crown of England is limited "to "the princess Sophia, and the heirs of her body, being protes- "tants," it becomes necessary to call in the assistance of lawyers, to ascertain the precise idea of the words "*heirs of her body*;" which in a legal sense comprise only certain of her lineal descendants.

2. If words happen to be still dubious, we may establish their meaning from the *context*; with which it may be of singular use to compare a word or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus the proeme, or preamble, is often called in to help the construction of an act of parliament. Of the same nature and use is the comparison of law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point (8). Thus, when the law of England

(8) It is an established rule of construction that statutes *in pari materiâ*, or upon the same subject, must be construed with a reference to each other; that is, that what is clear in one statute, shall be called in aid to explain what is obscure and ambiguous in another. Thus the last qualification act to kill game (22 and 23 Car. 2. c. 25.) enacts, "that every person not having lands and tenements, or some other es- "tate of inheritance, of the clear yearly value of 100*l.* or for life, or hav- "ing lease or leases of ninety-nine years of the clear yearly value of "150*l.*" (except certain persons) shall not be allowed to kill game. Upon this statute a doubt arose, whether the words *or for life* should be referred to the 100*l.* or to the 150*l.* *per annum*. The court of king's bench having looked into the former qualification acts, and having found that it was clear by the first qualification act (13 R. 1. st. 1. c. 13.) that a layman should have 40*s.* a year, and a priest 10*l.* a year, and that by the 1 Ja. c. 27. the qualifications were clearly an estate of

declares murder to be felony without benefit of clergy, we must resort to the same law of England to learn what the benefit of clergy is: and when the common law censures simoniacal contracts, it affords great light to the subject to consider what the canon law has adjudged to be simony.

3. As to the *subject-matter*, words are always to be understood as having a regard thereto; for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end. Thus, when a law of our Edward III. forbids all ecclesiastical persons to purchase *provisions* at Rome, it might seem to prohibit the buying of grain and other victual; but when we consider that the statute was made to repress the usurpations of the papal see, and that the nominations to benefices by the pope were called *provisions*, we shall see
[61] that the restraint is intended to be laid upon such provisions only.

4. As to the *effects* and *consequence*, the rule is, that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them. Therefore the Bolognian law, mentioned by Puffendorf[p], which enacted, "that whoever drew blood in "the streets should be punished with the utmost severity," was held after long debate not to extend to the surgeon,

[p] l. 5. c. 12. sec. 8.

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inheritance of 10*l.* a year, and an estate for life of 30*l.* a year, they presumed that it still was the intention of the legislature to make the yearly value of an estate for life greater than that of an estate of inheritance, though the same proportions were not preserved; and thereupon decided, that clergymen, and all others possessed of a life estate only, must have 150*l.* a year to be qualified to kill game. *Lowndes* v. *Lewis*, *E. T.* 22 *Geo.* 3.

The same rule to discover the intention of a testator is applied to wills, viz. the whole of a will shall be taken under consideration, in order to decypher the meaning of an obscure passage in it.

who opened the vein of a person that fell down in the street with a fit.

5. But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it. An instance of this is given in a case put by Cicero, or whoever was the author of the treatise inscribed to Herennius[q]. There was a law, that those who in a storm forsook the ship, should forfeit all property therein; and that the ship and lading should belong entirely to those who staid in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who by reason of his disease was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession, and claimed the benefit of the law. Now here all the learned agree, that the sick man is not within the reason of the law; for the reason of making it was, to give encouragement to such as should venture their lives to save the vessel: but this is a merit, which he could never pretend to, who neither staid in the ship upon that account, nor contributed any thing to its preservation (9).

From this method of interpreting laws, by the reason of them, arises what we call *equity*; which is thus defined by Grotius[r], "the correction of that, wherein the law (by "reason of its universality) is deficient." For since [62] in laws all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a a power vested of defining those circumstances, (which had

q l. 1. c. 11. r de aequitate. Sec. 3.

(9) See a very sensible chapter upon the interpretation of laws in general, in Rutherforth's Institutes of Natural Law, b, 2. c. 7.

they been foreseen) the legislator himself would have expressed. And these are the cases, which, according to Grotius, "*lex non exacte definit, sed arbitrio boni viri permittit*" (10)."

EQUITY thus depending, essentially, upon the particular circumstances of each individual case, there can be no established rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to a positive law. And, on the other hand, the liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law, without equity though hard and disagreeable, is much more desirable for the public good, than equity without law: which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.

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(10) The only *equity*, according to this description which exists in our government, either resides in the king, who can prevent the *summum jus* from becoming *summa injuria*, by an absolute or a conditional pardon, or in juries, who determine whether any, or to what extent, damages shall be rendered. But *equity*, as here explained, is by no means applicable to the court of chancery; for the learned Judge has elsewhere truly said, that "the system of our courts of equity is a "laboured connected system, governed by established rules, and bound "down by precedents, from which they do not depart, although the "reason of some of them may perhaps be liable to objection." 3 Vol. 432.

SECTION THE THIRD.

OF THE LAWS OF ENGLAND.

THE municipal law of England, or the rule of civil conduct prescribed to the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds: the *lex non scripta*, the unwritten, or common law; and the *lex scripta*, the written, or statute law.

THE *lex non scripta*, or unwritten law, includes not only *general customs*, or the common law properly so called; but also the *particular customs* of certain parts of the kingdom; and likewise those *particular laws*, that are by custom observed only in certain courts and jurisdictions.

WHEN I call these parts of our law *leges non scriptae*, I would not be understood as if all those laws were at present merely *oral*, or communicated from the former ages to the present solely by word of mouth. It is true indeed that, in the profound ignorance of letters which formerly overspread the whole western world, all laws were entirely traditional, for this plain reason, because the nations among which they prevailed had but little idea of writing. Thus the British as well as the Gallic druids committed all their laws as well as learning to memory[a]; and it is said of the primitive Saxons here, as well as their brethren on the continent, that *leges sola memoria et usu retinebant*[b]. But, with us at present, the monuments and evidences of our legal customs are contained in the records of the several courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profes-

a Cæs. de B. G. lib. 6. c. 13. b Spelm. Gl. 362.

sion, preserved and handed down to us from the times of highest antiquity. However, I therefore style these parts of our law *leges non scriptae*, because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom. In like manner as Aulus Gellius defines the *jus non scriptum* to be that, which is, "*tacito et illiterato hominum consensu et moribus expressum.*"

Our ancient lawyers, and particularly Fortescue[c], insist with abundance of warmth, that these customs are as old as the primitive Britons, and continued down, through the several mutations of government and inhabitants, to the present time, unchanged and unadulterated. This may be the case as to some: but in general, as Mr. Selden in his notes observes, this assertion must be understood with many grains of allowance; and ought only to signify, as the truth seems to be, that there never was any formal exchange of one system of laws for another: though doubtless by the intermixture of adventitious nations, the Romans, the Picts, the Saxons, the Danes, and the Normans, they must have insensibly introduced and incorporated many of their own customs with those that were before established: thereby in all probability improving the texture and wisdom of the whole, by the accumulated wisdom of divers particular countries. Our laws, saith lord Bacon[d], are mixed as our language: and as our language is so much the richer, the laws are the more complete.

And indeed our antiquaries and early historians do all positively assure us, that our body of laws is of this compounded nature. For they tell us that in the time of Alfred the local customs of the several provinces of the kingdom were grown so various, that he found it expedient to compile his *domebook*, or *liber judicialis*, for the general use of the whole king-

c c. 17. d See his proposals for a digest.

dom. This book is said to have been extant so late as the reign of king Edward the fourth, but is now unfortunately lost. It contained, we may probably suppose, the principal maxims of the common law, the penalties for misdemesnors, and the forms of judicial proceedings. Thus much may at least be collected from that injunction to observe it, which we find in the laws of king Edward the elder, the son of Alfred[e]. "*Omnibus qui reipublicae praesunt etiam atque etiam* "*mando, ut omnibus aequos se praebeant judices, perinde ac in* "*judiciali libro (Saxonice,* ðom bec) *scriptum habetur: nec* "*quicquam formident quin jus commune (Saxonice,* polcpihte) "*audacter libereque dicant.*"

But the irruption and establishment of the Danes in England, which followed soon after, introduced new customs, and caused this code of Alfred in many provinces to fall into disuse: or at least to be mixed and debased with other laws of a coarser alloy. So that about the beginning of the eleventh century there were three principal systems of laws prevailing in different districts. 1. The *Mercen-Lage*, or Mercian laws, which were observed in many of the midland counties, and those bordering on the principality of Wales, the retreat of the ancient Britons; and therefore very probably intermixed with the British or Druidical customs. 2. The *West-Saxon-Lage*, or laws of the West Saxons, which obtained in the counties to the south and west of the island, from Kent to Devonshire. These were probably much the same with the laws of Alfred above-mentioned, being the municipal law of the far most considerable part of his dominions, and particularly including Berkshire, the seat of his peculiar residence. 3. The *Dane-Lage*, or Danish law, the very name of which speaks its original and composition. This was principally maintained in the rest of the midland counties, and also on the eastern coast, the part most exposed to the visits of that piratical people. As for the very northern provinces, they were at that time under a distinct government[f].

[e] c. 1. [f] Hal. Hist. 55.

Out of these three laws, Roger Hovedens and Ranulphus Cestrensis[h] inform us, king Edward the confessor extracted one uniform law or digest of laws, to be observed throughout the whole kingdom; though Hoveden and the author of an old manuscript chronicle[i] assure us likewise, that this work was projected and begun by his grandfather king Edgar. And indeed a general digest of the same nature has been constantly found expedient, and therefore put in practice by other great nations, which were formed from an assemblage of little provinces, governed by peculiar customs. As in Portugul, under king Edward, about the beginning of the fifteenth century[k]. In Spain, under Alonzo X, who about the year 1250 executed the plan of his father St. Ferdinand, and collected all the provincial customs into one uniform law, in the celebrated code entitled *las partidas*[l]. And in Sweden, about the same æra; when a universal body of common law was compiled out of the particular customs established by the laghman of every province, and entitled the *land's lagh*, being analogous to the *common law* of England[m].

Both these undertakings, of king Edgar and Edward the confessor, seem to have been no more than a new edition, or fresh promulgation, of Alfred's code or dome-book, with such additions and improvements as the experience of a century and a half had suggested. For Alfred is generally styled by the same historians the *legum Anglicanarum conditor*, as Edward the confessor is the *restitutor*. These however are the laws which our histories so often mention under the name of the laws of Edward the confessor; which our ancestors struggled so hardly to maintain, under the first princes of the Norman line; and which subsequent princes so frequently promised to keep and restore, as the most popular act they could do, when pressed by foreign emergencies or domestic discontents. These are the laws, that so vigorously with-

g in Hen. II.
h in Edw. Confessor.
i in Seld. ad Eadmer. 6.
k Mod. Un. Hist. xxii. 135.
l Ibid. xx. 211.
m Ibid. xxxiii. 21. 58.

stood the repeated attacks of the civil law; which established in the twelfth century a new Roman empire over most of the states of the continent: states that have lost, and perhaps upon that account, their political liberties; while the free constitution of England, perhaps upon the same account, has been rather improved than debased. These, in short, are the laws which gave rise and original to that collection of maxims and customs, which is now known by the name of the common law. A name either given to it, in contradistinction to other laws, as the statute law, the civil law, the law merchant, and the like; or more probably, as a law common to all the realm, the *jus commune* or *folcright* mentioned by king Edward the elder, after the abolition of the several provincial customs and particular laws before-mentioned.

But though this is the most likely foundation of this collection of maxims and customs, yet the maxims and customs, so collected, are of higher antiquity than memory or history can reach (1); nothing being more difficult than to ascertain the precise beginning and first spring of an ancient and long established custom. Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary (2). This it is that gives it its weight and authority: and of this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this kingdom.

This unwritten, or common, law is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification. 2. Particular customs: which for the most part affect only the inhabi-

(1) What lord Hale says is undoubtedly true, that "the original "of the common law is as undiscoverable as the head of the Nile." Hist. Com. Law, 55.

(2) See note 10, p. 76.

tants of particular districts. 3. Certain particular laws; which by custom are adopted and used by some particular courts, of pretty general and extensive jurisdiction.

[68] I. As to general customs, or the common law, properly so called; this is that law, by which proceedings and determinations in the king's ordinary courts of justice are guided and directed. This, for the most part, settles the course in which lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and obligation of contracts; the rules of expounding wills, deeds, and acts of parliament; the respective remedies of civil injuries; the several species of temporal offences, with the manner and degree of punishment; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires. Thus, for example, that there shall be four superior courts of record, the chancery, the king's bench, the common pleas, and the exchequer; that the eldest son alone is heir to his ancestor; that property may be acquired and transferred by writing; that a deed is of no validity unless sealed and delivered; that wills shall be construed more favourably, and deeds more strictly; that money lent upon bond is recoverable by action of debt; that breaking the public peace is an offence, and punishable by fine and imprisonment; all these are doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon common law, for their support.

Some have divided the common law into two principal grounds or foundations: 1. Established customs; such as that, where there are three brothers, the eldest brother shall be heir to the second, in exclusion of the youngest: and 2. Established rules and maxims: as, "that the king can do "no wrong, that no man shall be bound to accuse him-"self," and the like. But I take these to be one and the same thing. For the authority of these maxims rests entirely upon general reception and usage: and the only method

of proving, that this or that maxim is a rule of the common law, is by shewing that it hath been always the custom to observe it.

BUT here a very natural, and very material, question [69] arises: how are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositaries of the laws, the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study; from the "*viginti annorum lucubrationes*," which Fortescue[n] mentions; and from being long personally accustomed to the judicial decisions of their predecessors. And indeed these judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law. The judgment itself, and all the proceedings previous thereto, are carefully registered and preserved, under the name of *records*, in public repositories set apart for that particular purpose; and to them frequent recourse is had, when any critical question arises, in the determination of which former precedents may give light or assistance. And therefore, even so early as the conquest, we find the "*praeteritorum memoria eventorum*" reckoned up as one of the chief qualifications of those, who were held to be "*legibus patriae optime instituti*[o]." For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but

n cap. 8. o Seld. review of Tith. c. 8.

according to the known laws and customs of the land: not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to
[70] reason; much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust (3), it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined. And hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us, that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law. Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and

(3) But it cannot be dissembled that both in our law, and in all other laws, there are decisions drawn from established principles and maxims, which are good law, though such decisions may be both manifestly absurd and unjust. But notwithstanding this, they must be religiously adhered to by the judges in all courts, who are not to assume the characters of legislators. It is their province *jus dicere*, and not *jus dare*. Lord Coke, in his enthusiastic fondness for the common law, goes farther than the learned Commentator; he lays down, that *argumentum ab inconvenienti plurimum valet in lege*, because *nihil quod est inconveniens est licitum*. Mr. Hargrave's note upon this is well conceived and expressed: "Arguments from inconvenience certainly deserve the greatest "attention, and where the weight of other reasoning is nearly on an "equipoise, ought to turn the scale. But if the rule of law is clear "and explicit, it is in vain to insist upon inconveniencies; nor can it be "true that nothing, which is inconvenient, is lawful, for that supposes "in those who make laws a perfection, which the most exalted human "wisdom is incapable of attaining, and would be an invincible argu-"ment against ever changing the law." *Harg. Co. Lit.* 66.

then the law will presume it to be well founded[p]. And it hath been an ancient observation in the laws of England, that whenever a standing rule of law, of which the reason perhaps could not be remembered or discerned, hath been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation.

THE doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust (4): for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration. To illustrate this doctrine by examples. It has been determined, time out of mind, that a brother of the half blood shall never succeed as heir to the estate of his half brother, but it shall rather escheat to the king, or other superior lord. Now this is a positive law, fixed

p Herein agreeing with the civil law, Ff. 1. 3. 20, 21. "Non omnium, quae a "majoribus nostris constituta sunt, ratio "reddi potest. Et ideo rationes eorum, "quae constituuntur, inquisi non oportet: "alioquin multa ex his, quae certa sunt, "subvertuntur."

(4) Precedents and rules must be followed even when they are flatly absurd and unjust, if they are agreeable to ancient principles. If an act of parliament had been brought in at the close of a session, and passed on the last day, which made an innocent act criminal, or even a capital crime; and if no day was fixed for the commencement of its operation, it had the same efficacy as if it had been passed on the first day of the session, and all, who, during a long session, had been doing an act, which at the time was legal and inoffensive, were liable to suffer the punishment prescribed by the statute. (4 *Inst.* 25. 4 *Term Rep.* 660.) This was both flatly absurd and unjust; but it was the clear law of England, and could only be abrogated by the united authority of the king, lords, and commons, in parliament assembled; who by the 33 Geo. 3. c. 13. enacted, that when the operation of an act of parliament is not directed to commence from any time specified within it, the clerk of the parliaments shall endorse upon it the day upon which it receives the royal assent, and that day shall be the date of its commencement. Many other similar instances might be adduced.

and established by custom, which custom is evidenced by judicial decisions; and therefore can never be departed from by any modern judge without a breach of his oath, and [71] the law. For herein there is nothing repugnant to natural justice (5); though the artificial reason of it, drawn from the feodal law, may not be quite obvious to every body. And therefore, though a modern judge, on account of a supposed hardship upon the half brother, might wish it had been otherwise settled, yet it is not in his power to alter it. But if any court were now to determine, that an elder brother of the half blood might enter upon and seize any lands that were purchased by his younger brother, no subsequent judges would scruple to declare that such prior determination was unjust, was unreasonable, and therefore was *not law*. So that *the law*, and the *opinion of the judge*, are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law. Upon the whole, however, we may take it as a general rule, "that the decisions "of courts of justice are the evidence of what is common "law:" in the same manner as, in the civil law, what the emperor had once determined was to serve for a guide for the future q.

THE decisions therefore of courts are held in the highest regard, and are not only preserved as authentic records in the

q "Si imperialis majestas causam cogni- "tionaliter examinaverit, et partibus, coram- "constitutis sententiam dixerit, omnes om- "nino judices, qui sub nostro imperio sunt, "sciant hanc esse legem, non solum illi causæ "pro qua producta est, sed et in omnibus "similibus." C. 1. 14. 12.

(5) But it is certainly repugnant to natural reason, where a father leaves two sons by two different mothers, and dies intestate, and a large estate descends to his eldest son, who dies a minor or intestate, that this estate should go to the lord of the manor or to the king, rather than to the younger son. When any such case of great notoriety occurs, this law will probably then appear so absurd and unreasonable, that it will not be suffered to remain long afterwards a reproach to our system of jurisprudence. See vol. ii. p. 231.

treasuries of the several courts, but are handed out to public view in the numerous volumes of *reports* which furnish the lawyer's library. These reports are histories of the several cases, with a short summary of the proceedings, which are preserved at large in the record; the arguments on both sides and the reasons the court gave for its judgment; taken down in short notes by persons present at the determination. And these serve as indexes to, and also to explain, the records; which always, in matters of consequence and nicety, the judges direct to be searched. The reports are extant in a regular series from the reign of king Edward the second inclusive; and from his time to that of Henry the eighth were taken by the prothonotaries, or chief scribes of the court, at the [72] expense of the crown, and published *annually*, whence they are known under the denomination of the *year books*. And it is much to be wished that this beneficial custom had, under proper regulations, been continued to this day: for, though king James the first at the instance of lord Bacon appointed two reporters[r] with a handsome stipend for this purpose, yet that wise institution was soon neglected, and from the reign of Henry the eighth to the present time this task has been executed by many private and contemporary hands; who, sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very crude and imperfect (perhaps contradictory) accounts of one and the same determination. Some of the most valuable of the ancient reports are those published by lord chief justice Coke; a man of infinite learning in his profession, though not a little infected with the pedantry and quaintness of the times he lived in, which appear strongly in all his works. However his writings are so highly esteemed, that they are generally cited without the author's name[s].

r Pat. 15 Jac. I. p. 18. 17 Rym. 26.

s His reports, for instance, are styled, κατ' ἐξοχην, *the reports*; and in quoting them we usually say, 1 or 2 Rep^t not 1 or 2 Coke's Rep. as in citing other authors. The reports of judge Croke are also cited in a peculiar manner, by the name of those princes in whose reigns the cases reported in his three

BESIDES these reporters, there are also other authors, to whom great veneration and respect is paid by the students of the common law Such are Glanvil and Bracton, Britton and Fleta, Hengham and Littleton, Statham, Brooke, Fitzherbert, and Staundforde, with some others of ancient date; whose treatises are cited as authority, and are evidence that cases have formerly happened in which such and such points were determined, which are now become settled and first principles. One of the last of these methodical writers in point of time, whose works are of any intrinsic authority in the courts of justice, and do not entirely depend on the strength of their quotations from older authors, is the same learned judge we have just mentioned, sir Edward Coke; who hath written four volumes of institutes, as he is pleased to call them, though they have little of the institutional method to warrant such a title. The first volume is a very extensive comment upon a little excellent treatise of tenures, compiled by judge Littleton, in the reign of Edward the fourth. This comment is a rich mine of valuable common law learning, collected and heaped together from the ancient reports and year books, but greatly defective in method[s]. The second volume is a comment upon many old acts of parliament, without any systematical order; the third a more methodical treatise of the pleas of the crown; and the fourth an account of the several species of courts[t].

[73]

AND thus much for the first ground and chief corner stone of the laws of England, which is general immemorial custom, or common law, from time to time declared in the decisions of the courts of justice; which decisions are preserved among our public records, explained in our reports, and digested

volumes were determined; viz. queen Elizabeth, king James, and king Charles the first; as well as by the number of each volume. For sometimes we call them 1, 2, and 3 Cro. but more commonly Cro. Eliz. Cro. Jac. and Cro. Car.

s It is usually cited either by the name of Co. Litt. or as 1 Inst.

t These are cited as 2, 3, or 4 Inst. without any author's name. An honorary distinction, which, we observed, is paid to the works of no other writer; the generality of reports and other tracts being quoted in the name of the compiler, as 2 Ventris, 4 Leonard, 1 Siderfin, and the like.

for general use in the authoritative writings of the venerable sages of the law.

THE Roman law, as practised in the times of its liberty, paid also a great regard to custom; but not so much as our law: it only then adopting it, when the written law was deficient. Though the reasons alleged in the digest[u] will fully justify our practice, in making it of equal authority with, when it is not contradicted by the written law. "For since, "says Julianus, the written law binds us for no other reason "but because it is approved by the judgment of the people, "therefore those laws which the people have approved "without writing ought also to bind every body. For "where is the difference, whether the people declare [74] "their assent to a law by suffrage, or by a uniform "course of acting accordingly?" Thus did they reason while Rome had some remains of her freedom; but when the imperial tyranny came to be fully established, the civil laws speak a very different language. "*Quod principi pla-*"*cuit* (6) *legis habet vigorem, cum populus ei et in eum omne* "*suum imperium et potestatem conferat*," says Ulpian[w].

[u] Ff. 1. 3. 32. [w] Ff. 1. 4. 1.

(6) This is the first sentence of the definition of a constitution in the beginning of the Institutes. It ought to be cited at length, that it may receive the execration it deserves. It is no wonder from this specimen, that the civil law should have experienced such protection and patronage from all the despotic governments of Europe, and such opposition and detestation from the sturdy English barons.

CONSTITUTIO.

Sed et quod principi placuit, legis habet vigorem: quum lege regia, quæ de ejus imperio lata est, populus ei, et in eum omne imperium suum et potestatem concedat. Quodcunque ergo imperator per epistolam constituit; vel cognoscens decrevit, vel edicto præcepit, legem esse constat; hæc sunt, quæ constitutiones appellantur. Planè ex his quædam sunt personales, quæ nec ad exemplum trahuntur, quoniam non hoc princeps vult, nam quod alicui ob meritum indulsit, vel si quam pœnam irrogavit, vel si cui sine exemplo subvenit, personam non transgreditur. Aliæ autem, quum generales sint, omnes procul dubio tenent. Inst. 1, 2. 6.

"*Imperator solus et conditor et interpres legis existimatur*," says the code[x]. And again, "*sacrilegii instar est rescripta "principia obviare*[y]." And indeed it is one of the characteristic marks of English liberty, that our common law depends upon custom; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people (7).

II. The second branch of the unwritten laws of England are particular customs, or laws which affect only the inhabitants of particular districts.

x C. 1. 14. 12. y C. 1. 23. 5.

(7) Lord chief justice Wilmot has said, that "the statute law is the "will of the legislature in writing; the common law is nothing else "but statutes worn out by time. All our law began by consent of the "legislature, and whether it is now law by usage or writing is the "same thing. (2 *Wils.* 348.) And statute law and common law both "originally flowed from the same fountain." (*Ib.* 350.) And to the same effect lord Hale declares, "that many of those things that we "now take for common law, were undoubtedly acts of parliament, "though now not to be found of record." (*Hist. Com. Law*, 66.) Though this is the probable origin of the greatest part of the common law, yet much of it certainly has been introduced by usage, even of modern date, which general convenience has adopted. As in the civil law, *sine scripto jus venit, quod usus approbavit, nam diuturni mores consensu utentium comprobati legem imitantur.* (Inst. 1, 2. 9.) Of this nature in this country is the law of the road, viz. that horses and carriages should respectively keep the left side of the road, and consequently in meeting should pass each other on the whip hand. This law has not been enacted by statute, and is so modern, that perhaps this is the first time that it has been noticed in a book of law. But general convenience discovered the necessity of it, and the judges have so far confirmed it, as to declare frequently at nisi prius, that he who disregards this salutary rule is answerable in damages for all the consequences. The action, in which this rule is applied, viz. for negligently driving a carriage, by which any one is injured, is as ancient as the common law; but the uniform determination of the judges, that the non-observance of this rule is negligence, is of modern date.

These particular customs, or some of them, are without doubt the remains of that multitude of local customs before-mentioned, out of which the common law, as it now stands, was collected at first by king Alfred, and afterwards by king Edgar and Edward the confessor: each district mutually sacrificing some of its own special usages, in order that the whole kingdom might enjoy the benefit of one uniform and universal system of laws. But for reasons that have been now long forgotten, particular counties, cities, towns, manors, and lordships, were very early indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation at large: which privilege is confirmed to them by several acts of parliament[z].

Such is the custom of gavelkind in Kent and some other parts of the kingdom (though perhaps it was also general till the Norman conquest) which ordains, among other things, that not the eldest son only of the father shall [75] succeed to his inheritance, but all the sons alike: and that, though the ancestor be attainted and hanged, yet the heir shall succeed to his estate, without any escheat to the lord. Such is the custom that prevails in divers ancient boroughs, and therefore called borough-english, that the youngest son shall inherit the estate, in preference to all his elder brothers. Such is the custom in other boroughs that a widow shall be entitled, for her dower, to all her husband's lands; whereas at the common law she shall be endowed of one third part only. Such also are the special and particular customs of manors, of which every one has more or less, and which bind all the copyhold and customary tenants that hold of the said manors. Such likewise is the custom of holding divers inferior courts, with power of trying causes, in cities and trading towns, the right of holding which, when no royal grant can be shewn, depends entirely upon immemorial and established usage. Such, lastly, are many particular customs within the city of London, with regard to trade, apprentices, widows, orphans,

z Mag. Cart. 9 Hen. III. c. 9. —— 1. c. 1. and 2 Hen. IV. c. 1. 1 Edw. III. st. 2. c. 9. 14 Edw. III. st.

and a variety of other matters. All these are contrary to the general law of the land, and are good only by special usage; though the customs of London are also confirmed by act of parliament[a].

To this head may most properly be referred a particular system of customs used only among one set of the king's subjects, called the custom of merchants or *lex mercatoria:* which, however different from the general rules of the common law, is yet ingrafted into it, and made a part of it[b]; being allowed, for the benefit of trade, to be of the utmost validity in all commercial transactions: for it is a maxim of law, that "*cuilibet in "sua arte credendum est* (8)."

THE rules relating to particular customs regard either the *proof* of their existence; their *legality* when proved; or their usual method of *allowance*. And first we will consider the rules of *proof*.

[76] As to gavelkind, and borough-english, the law takes particular notice of them[c], and there is no occasion to

a 8 Rep. 126. Cro. Car. 347. b Winch. 24. c Co. Litt. 175.

(8) The *lex mercatoria*, or the custom of merchants, like the *lex et consuetudo parliamenti*, describes only a great division of the law of England. The laws relating to bills of exchange, insurance, and all mercantile contracts, are as much the general law of the land, as the laws relating to marriage or murder. But the expression has frequently led merchants to suppose, that all their new fashions and devices immediately become the law of the land: a notion which, perhaps, has been too much encouraged by the courts. Merchants ought to take their law from the courts, and not the courts from merchants: and when the law is found inconvenient for the purposes of extended commerce, application ought to be made to parliament for redress. This is agreeable to the opinion of Mr. justice Foster, who maintains, that "the custom of merchants is the general law of the "kingdom, and therefore ought not to be left to a jury after it has "been settled by judicial determinations." 2 *Bur.* 1226.

prove that such customs actually exist, but only that the lands in question are subject thereto. All other private customs must be particularly pleaded[d], and as well the existence of such customs must be shewn, as that the thing in dispute is within the custom alleged. The trial in both cases (both to shew the existence of the custom, as, "that in the manor of Dale "lands shall descend only to the heirs male, and never to "the heirs female;" and also to shew "that the lands in "question are within that manor") is by a jury of twelve men, and not by the judges; except the same particular custom has been before tried, determined, and recorded in the same court[e].

THE customs of London differ from all others in point of trial: for, if the existence of the custom be brought in question, it shall not be tried by a jury, but by certificate from the lord mayor and aldermen by the mouth (9) of their recorder[f]; unless it be such a custom as the corporation is itself interested in, as a right of taking toll, &c. for then the law permits them not to certify on their own behalf[g].

WHEN a custom is actually proved to exist, the next inquiry is into the *legality* of it; for, if it is not a good custom, it ought to be no longer used; "*Malus usus abolendus est*" is

d Litt. sec. 265.
e Dr. and St. 1. 10.
f Cro. Car. 516.
g Hob. 85.

(9) Sir James Burrow has reported the mode by which the recorder certifies the custom with such a degree of accuracy, as to specify which of his four gowns he shall wear upon the occasion. (1 *Bur.* 248.) When a custom has been once certified by the recorder, the judges will take notice of it, and will not suffer it to be certified a second time. (*Doug.* 365.) Lord Mansfield nonsuited the plaintiff in an action brought against the defendant on the custom of London, for calling the plaintiff a whore, the plaintiff not being able to prove the custom of inflicting a corporal punishment, by carting women of that description. But in the city court such an action is maintained, because they take notice of their own customs without proof. *Ib.*

an established maxim of the law[h]. To make a particular custom good, the following are necessary requisites.

1. THAT it have been used so long, that the memory of man runneth not to the contrary. So that, if any one can shew the beginning of it (10), it is no good custom. For which reason no custom can prevail against an express act of [77] parliament (11); since the statute itself is a proof of a time when such a custom did not exist[j].

2. It must have been *continued*. Any interruption would cause a temporary ceasing: the revival gives it a new beginning, which will be within time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of the *right*; for an interruption of the *possession* only, for ten or twenty years, will not destroy the custom[i]. As if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed, though they do not use it for ten years; it only becomes more difficult to prove: but if the *right* be any how discontinued for a day, the custom is quite at an end.

3. IT must have been *peaceable*, and acquiesced in; not subject to contention and dispute[k]. For as customs owe their

h Litt. sec. 212. 4 Inst. 274.
i Co. Litt. 114.
j Co. Litt. 113
k Ibid.

(10) If any one can shew the beginning of it within legal memory, that is, within any time since the first year of the reign of Richard the first, it is not a good custom.

(11) Therefore a custom that every pound of butter sold in a certain market should weigh 18 ounces is bad, because it is directly contrary to 13 & 14 Car. II. c. 26, which directs, that every pound, throughout the kingdom, shall contain 16 ounces. (3 T. R. 271.) But there could be no doubt, I conceive, but it would be a good custom to sell lumps of butter containing 18 ounces; for if it is lawful to sell a pound, it must be so to sell a pound and any aliquot part of one. The inconvenience and deception arise from calling that a pound in one place which is not a pound in another.

original to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting.

4. CUSTOMS must be *reasonable*[l]; or, rather taken negatively, they must not be unreasonable. Which is not always, as sir Edward Coke says[m], to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law. Upon which account a custom may be good, though the particular reason of it cannot be assigned; for it sufficeth, if no good legal reason can be assigned against it. Thus a custom in a parish, that no man shall put his beasts into the common till the third of October, would be good; and yet it would be hard to shew the reason why that day in particular is fixed upon, rather than the day before or after. But a custom, that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable, and therefore bad: for peradventure the lord will never put in his; and then the tenants will lose all their profits[n].

5. CUSTOMS ought to be *certain*. A custom, that [78] lands shall descend to the most worthy of the owner's blood, is void; for how shall this worth be determined? but a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good[o]. A custom to pay two pence an acre in lieu of tithes, is good; but to pay sometimes two pence and sometimes three pence, as the occupier of the land pleases, is bad for its uncertainty. Yet a custom, to pay a year's improved value for a fine on a copyhold estate, is good; though the value is a thing uncertain: for the value may at any time be ascertained; and the maxim of law is, *id certum est, quod certum reddi potest* (12).

l Litt. sec. 212.
m 1 Inst. 62.
n Co. Copyh. sec. 33.
o 1 Roll. Abr. 565.

(12) A custom, that poor housekeepers shall carry away rotten wood in a chase is bad, being too vague and uncertain. 2 *T. R.* 758.

6. CUSTOMS, though established by consent, must be (when established) *compulsory*; and not left to the option of every man, whether he will use them or no. Therefore a custom, that all the inhabitants shall be rated toward the maintenance of a bridge, will be good; but a custom, that every man is to contribute thereto at his own pleasure, is idle and absurd, and indeed no custom at all.

7. LASTLY, customs must be *consistent* with each other: one custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity, and both established by mutual consent: which to say of contradictory customs is absurd. Therefore, if one man prescribes that by custom he has a right to have windows looking into another's garden; the other cannot claim a right by custom to stop up or obstruct those windows: for these two contradictory customs cannot both be good, nor both stand together. He ought rather to deny the existence of the former custom[p].

NEXT, as to the *allowance* of special customs. Customs, in derogation of the common law, must be construed strictly (13). Thus, by the custom of gavelkind, an infant of [79] fifteen years may by one species of conveyance (called a deed of feoffment) convey away his lands in fee simple, or for ever. Yet this custom does not empower him to use any other conveyance, or even to lease them for seven years: for the custom must be strictly pursued[q]. And more-

[p] 9 Rep. 58. [q] Co. Cop. sec. 33.

(13) This rule is founded upon the consideration, that a variety of customs in different places upon the same subject is a general inconvenience; the courts therefore will not admit such customs but upon the clearest proof. So where there is a custom that lands shall descend to the eldest sister, the courts will not extend this custom to the eldest nicce, or to any other eldest female relation, but upon the same authority by which the custom between sisters is supported. 1 *T. R.* 466.

over, all special customs must submit to the king's prerogative. Therefore, if the king purchases lands of the nature of gavelkind, where all the sons inherit equally; yet upon the king's demise, his eldest son shall succeed to those lands alone[r]. And thus much for the second part of the *leges non scriptae*, or those particular customs which affect particular persons or districts only.

III. The third branch of them are those peculiar laws which by custom are adopted and used only in certain peculiar courts and jurisdictions. And by these I understand the civil and canon laws.

It may seem a little improper at first view to rank these laws under the head of *leges non scriptae*, or unwritten laws, seeing they are set forth by authority in their pandects, their codes, and their institutions; their councils, decrees, and decretals; and enforced by an immense number of expositions, decisions, and treatises of the learned in both branches of the law. But I do this, after the example of sir Matthew Hale[s], because it is most plain, that it is not on account of their being *written* laws, that either the canon law, or the civil law, have any obligation within this kingdom: neither do their force and efficacy depend upon their own intrinsic authority; which is the case of our written laws, or acts of parliament. They bind not the subjects of England, because their materials were collected from popes or emperors, were digested by Justinian, or declared to be authentic by Gregory. These considerations give them no authority here: for the legislature of England doth not, nor ever did, recognise any foreign power, as superior or equal to it in this kingdom; or as having the right to give law to any, the meanest, of its subjects. But all the strength that either the papal or imperial laws have obtained in this [80] realm (or indeed in any other kingdom in Europe) is only because they have been admitted and received by immemorial usage and custom in some particular cases, and some particular courts; and then they form a branch of the *leges non*

r Co. Litt. 15. s Hist. C. L. c. 2.

scriptae, or customary laws; or else, because they are in some other cases introduced by consent of parliament, and then they owe their validity to the *leges scriptae*, or statute law. This is expressly declared in those remarkable words of the satute 25 Hen. VIII. c. 21. addressed to the king's royal majesty. "This your grace's realm, recognising no superior under God "but only your grace, hath been and is free from subjection to "any man's laws, but only to such as have been devised, made, "and ordained *within* this realm for the wealth of the same; "or to such other as, by sufferance of your grace and your "progenitors, the people of this your realm have taken at their "free liberty, by their own consent, to be used among them; "and have bound themselves by long use and custom to the "observance of the same: not as to the observance of the laws "of any foreign prince, potentate, or prelate; but as to the "*customed* and ancient laws of this realm, originally established "as laws of the same, by the said sufferance, consents, and "custom; and none otherwise."

By the civil law, absolutely taken, is generally understood the civil or municipal law of the Roman empire, as comprised in the institutes, the code, and the digest of the emperor Justinian, and the novel constitutions of himself and some of his successors. Of which, as there will frequently be occasion to cite them, by way of illustrating our own laws, it may not be amiss to give a short and general account.

The Roman law (founded first upon the regal constitutions of their ancient kings, next upon the twelve tables of the *decemviri*, then upon the laws or statutes enacted by the senate or people, the edicts of the prætor, and the *responsa prudentum*, or opinions of learned lawyers, and lastly upon the imperial decrees, [81] or constitutions of successive emperors) had grown to so great a bulk, or, as Livy expresses it[t], "*tam immensus aliarum super alias acervatarum legum cumulus*," that they were computed to be many camels' load by an author who preceded Justinian[u]. This was in part remedied by the

[t] l. 3. c. 34.

[u] Taylor's elements of civil law, 17.

collections of three private lawyers, Gregorius, Hermogenes, and Papirius; and then by the emperor Theodosius the younger, by whose orders a code was compiled, *A. D.* 438, being a methodical collection of all the imperial constitutions then in force: which Theodosian code was the only book of civil law received as authentic in the western part of Europe, till many centuries after; and to this it is probable that the Franks and Goths might frequently pay some regard, in framing legal constitutions for their newly erected kingdoms. For Justinian commanded only in the eastern remains of the empire; and it was under his auspices, that the present body of civil law was compiled and finished by Tribonian and other lawyers, about the year 533.

This consists of, 1. The institutes, which contain the elements or first principles of the Roman law, in four books. 2. The digests, or pandects, in fifty books, containing the opinions and writings of eminent lawyers, digested in a systematical method. 3. A new code, or collection of imperial constitutions, in twelve books; the lapse of a whole century having rendered the former code, of Theodosius, imperfect. 4. The novels or new constitutions, posterior in time to the other books, and amounting to a supplement to the code; containing new decrees of successive emperors, as new questions happened to arise. These form the body of Roman law, or *corpus juris civilis*, as published about the time of Justinian; which however fell soon into neglect and oblivion, till about the year 1130, when a copy of the digests was found at Amalfi in Italy: which accident, concurring with the policy of the Roman ecclesiastics[w], suddenly gave new vogue and authority to the civil law, introduced it into several nations, and occasioned that mighty inundation of voluminous comments, with which this system of law, more than any other, is now loaded (14). [82]

[w] See sec. 1. page 18.

(14) See a full, lucid, and elegant account of the civil law in Giannone's History of Naples, in lib. 3. c. 3. which he thus con-

THE canon law is a body of Roman ecclesiastical law, relative to such matters as that church either has or pretends to have, the proper jurisdiction over. This is compiled from the opinions of the ancient Latin fathers, the decrees of general councils, and the decretal epistles and bulles of the holy see. All which lay in the same disorder and confusion as the Roman civil law: till, about the year 1151, one Gratian an Italian monk, animated by the discovery of Justinian's pandects, reduced the ecclesiastical constitutions also into some method, in three books; which he entitled *concordia discordantium canonum*, but which are generally known by the name of *decretum Gratiani*. These reached as low as the time of pope Alexander III. The subsequent papal decrees, to the pontificate of Gregory IX, were published in much the same method under the auspices of that pope, about the year 1230, in five books; entitled *decretalia Gregorii noni*. A sixth book was added by Boniface VIII, about the year 1298, which is called *sextus decretalium*. The Clementine constitutions, or decrees of Clement V, were in like manner authenticated in 1317 by his successor John XXII; who also published twenty constitutions of his own, called the *extravagantes Joannis:* all which in some measure answer to the novels of the civil law. To these have been since added some decrees of later popes, in five books, called *extravagantes communes*. And all these together, Gratian's decree, Gregory's decretals, the sixth decretal, the Clementine constitutions, and the extravagants of

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cludes: "Evedi in tanto le strane vicende delle mondane cose: questa "grand' opera di Giustiniano con tanta cura, e studio compilata, che "per tutti i secoli avrebbe dovuto correre gloriosa, e immortale, ap- "pena mancato il suo Autore, che restò anch'ella per lo spazio di "cinque secoli sepolta in tenebre densissime, ed in una profonda obli- "vione; risorta poi in Occidente à tempi di Lottario, fu così avventu- "rosa, che alzò i vanni, e la fama sopra tutte l' altre Provincie del "Mondo, nè trovò Nazione alcuna culta, o barbara che fosse, che in "somma stima, e venerazione non l'avesse, e che non la preferisse "alle medesime loro proprie leggi, e costumi."

John and his successors, form the *corpus juris canonici*, or body of the Roman canon law.

Besides these pontifical collections, which during the times of popery were received as authentic in this island, as well as in other parts of Christendom, there is also a kind of national canon law, composed of *legatine* and *provincial* constitutions, and adapted only to the exigencies of this church and kingdom. The *legatine* constitutions were [83] ecclesiastical laws, enacted in national synods, held under the cardinals Otho and Othobon, legates from pope Gregory IX and pope Clement IV, in the reign of king Henry III, about the years 1220 and 1268. The *provincial* constitutions are principally the decrees of provincial synods, held under divers archbishops of Canterbury, from Stephen Langton in the reign of Henry III to Henry Chichele in the reign of Henry V; and adopted also by the province of York[x] in the reign of Henry VI. At the dawn of the reformation, in the reign of king Henry VIII, it was enacted in parliament[y] that a review should be had of the canon law; and, till such review should be made, all canons, constitutions, ordinances, and synodals provincial, being then already made, and not repugnant to the law of the land or the king's prerogative, should still be used and executed. And, as no such review has yet been perfected, upon this statute now depends the authority of the canon law in England.

As for the canons enacted by the clergy under James I, in the year 1603, and never confirmed in parliament, it has been solemnly adjudged upon the principles of law and the constitution, that where they are not merely declaratory of the ancient canon law, but are introductory of new regulations, they do not bind the laity[z]; whatever regard the clergy may think proper to pay them (14).

x Burn's eccl. law, pref. viii.
y Statute 25 Hen. VIII, c. 19; revived and confirmed by 1 Eliz. c. 1.
z Stra. 1057.

(14) Lord Hardwicke cites the opinion of lord Holt, and declares it is not denied by any one, that it is very plain all the clergy are bound

THERE are four species of courts, in which the civil and canon laws are permitted (under different restrictions) to be used. 1. The courts of the archbishops and bishops, and their derivative officers, usually called in our law courts christian, *curiae christianitatis*, or the ecclesiastical courts. 2. The military courts. 3. The courts of admiralty. 4. The courts of the two universities. In all, their reception in general, and the different degrees of that reception, are grounded entirely upon custom; corroborated in the latter instance by act of parliament, ratifying those charters [84] which confirm the customary law of the universities.

The more minute consideration of these will fall properly under that part of these commentaries which treats of the jurisdiction of courts. It will suffice at present to remark a few particulars relative to them all, which may serve to inculcate more strongly the doctrine laid down concerning them[a].

1. AND, first, the courts of common law have the superintendency over these courts; to keep them within their jurisdictions, to determine wherein they exceed them, to restrain and prohibit such excess, and (in case of contumacy) to punish the officer who executes, and in some cases the judge who enforces, the sentence so declared to be illegal.

2. THE common law has reserved to itself the exposition of all such acts of parliament, as concern either the extent of these courts, or the matters depending before them. And

a Hale Hist. c. 2.

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by the canons confirmed by the king only, but they must be confirmed by the parliament to bind the laity. (2 *Atk.* 605.) Hence it has been decided, that if the Archbishop of Canterbury grants a dispensation to hold two livings distant from each other more than thirty miles, no advantage can be taken of it by lapse or otherwise in the temporal courts, for the restriction to thirty miles was introduced by a canon made since the 25 Henry VIII. 2 *Bl. Rep.* 968.

therefore, if these courts either refuse to allow these acts of parliament, or will expound them in any other sense than what the common law puts upon them, the king's courts at Westminster will grant prohibitions to restrain and control them.

3. An appeal lies from all these courts to the king, in the last resort; which proves that the jurisdiction exercised in them is derived from the crown of England, and not from any foreign potentate, or intrinsic authority of their own. And, from these three strong marks and ensigns of superiority, it appears beyond a doubt, that the civil and canon laws, though admitted in some cases by custom in some courts, are only subordinate, and *leges sub graviori lege*; and that, thus admitted, restrained, altered, new-modelled, and amended, they are by no means with us a distinct independent species of laws, but are inferior branches of the customary or unwritten laws of England, properly called the king's ecclesiastical, the king's military, the king's maritime, or the king's academical laws.

Let us next proceed to the *leges scriptae*, the written laws of the kingdom; which are statutes, acts, or [85] edicts, made by the king's majesty, by and with the advice and consent of the lords spiritual and temporal and commons in parliament assembled[b]. The oldest of these now extant, and printed in our statute books, is the famous *magna charta*, as confirmed in parliament 9 Hen. III: though doubtless there were many acts before that time, the records of which are now lost, and the determinations of them perhaps at present currently received for the maxims of the old common law.

The manner of making these statutes will be better considered hereafter, when we examine the constitution of parliaments. At present we will only take notice of the different

[b] 8 Rep. 20.

kinds of statutes; and of some general rules with regard to their construction[c].

First, as to their several kinds. Statutes are either *general* or *special*, *public* or *private*. A general or public act is an universal rule, that regards the whole community: [86] and of this the courts of law are bound to take notice judicially and *ex officio*; without the statute being particularly pleaded, or formally set forth by the party who claims an advantage under it. Special or private acts are rather exceptions than rules, being those which only operate upon particular persons, and private concerns: such as the Romans entitled *senatus decreta*, in contradistinction to the *senatus consulta*, which regarded the whole community[d]: and of these (which are not promulgated with the same notoriety as the former) the judges are not bound to take notice, unless they be formally shewn and pleaded. Thus, to shew the distinction, the statute 13 Eliz. c. 10. to prevent spiritual persons from making leases for longer terms than twenty-one years, or three lives, is a public act; it being a rule prescribed to the whole body of spiritual persons in the nation: but an act to enable the

c The method of citing these acts of parliament is various. Many of our ancient statutes are called after the name of the place where the parliament was held that made them; as the statutes of Merton and Marleberge, of Westminster, Gloucester, and Winchester. Others are denominated entirely from their subject; as the statutes of Wales and Ireland, the *articuli cleri*, and the *prerogativa regis*. Some are distinguished by their initial words, a method of citing very ancient; being used by the Jews in denominating the books of the pentateuch; by the christian church in distinguishing their hymns and divine offices; by the Romanists in describing their papal bulles; and in short by the whole body of ancient civilians and canonists, among whom this method of citation generally prevailed, not only with regard to chapters, but inferior sections also; in imitation of all which we still call some of our old statutes by their initial words, as the statute of *quia emptores*, and that of *circumspecte agatis*. But the most usual method of citing them, especially since the time of Edward the second, is by naming the year of the king's reign in which the statute was made, together with the chapter or particular act, according to its numeral order, as, 9 Geo. II. c. 4. For all the acts of one session of parliament taken together make properly but one statute; and therefore when two sessions have been held in one year, we usually mention stat. 1. or 2. Thus the bill of rights is cited, as 1 W. and M. st. 2. c. 2. signifying that it is the second chapter or act, of the second statute, or the laws made in the second session of parliament, in the first year of king William and queen Mary.

d Gravin. Orig. 1. sec. 24.

bishop of Chester to make a lease to A. B. for sixty years, is an exception to this rule; it concerns only the parties and the bishop's successors; and is therefore a private act.

STATUTES also are either *declaratory* of the common law, or *remedial* of some defects therein (15). Declaratory, where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case the parliament has thought proper, *in perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been. Thus the statute of treasons, 25 Edw. III. cap. 2. doth not make any new species of treasons; but only, for the benefit of the subject, declares and enumerates those several kinds of offence, which before were treason at the common law. Remedial statutes are those which are made to supply such defects, and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatsoever. And this being done, either by enlarging the common law where it was too narrow and circumscribed, or by restraining it where it was too lax and [87] luxuriant, hath occasioned another subordinate division of remedial acts of parliament into *enlarging* and *restraining* statutes. To instance again in the case of treason. Clipping the current coin of the kingdom was an offence not sufficiently guarded against by the common law: therefore it was thought expedient by statute 5 Eliz. c. 11. to make it high treason, which it was not at the common law; so that

(15) This division is generally expressed by declaratory statutes, and statutes introductory of a new law. Remedial statutes are generally mentioned in contradistinction to penal statutes. See note 19. p. 88.

this was an *enlarging* statute (16). At common law also spiritual corporations might lease out their estates for any term of years, till prevented by the statute 13 Eliz. before mentioned: this was therefore a *restraining* statute.

SECONDLY, the rules to be observed with regard to the construction of statutes are principally these which follow:

1. THERE are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy: that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act, as to suppress the mischief and advance the remedy[e]. Let us instance again in the same restraining statute of 13 Eliz. c. 10. By the common law, ecclesiastical corporations might let as long leases as they thought proper: the mischief was, that they let long and unreasonable leases, to the impoverishment of their successors: the remedy applied by the statute was by making void all leases by ecclesiastical bodies for longer terms than three lives or twenty-one years. Now in the construction of this statute it is held, that leases, though for a longer time,

e Rep. 7. Co. Litt. 11. 42.

(16) This statute against clipping the coin hardly corresponds with the general notion either of a remedial or an enlarging statute. In ordinary legal language, remedial statutes are contradistinguished to penal statutes. An enlarging or an enabling statute is one which increases, not restrains, the power of action; as the 32 Hen. VIII. c. 28. which gave bishops and all other sole ecclesiastical coporations, except parsons and vicars, a power of making leases, which they did not possess before, is always called an enabling statute. The 13 Eliz. c. 10. which afterwards limited the power of spiritual persons to make leases, is on the contrary styled a restraining or disabling statute. See this fully explained by the learned commentator, 2 Vol. p. 319.

if made by a bishop, are not void during the bishop's continuance in his see; or, if made by a dean and chapter, they are not void during the continuance of the dean: for the act was made for the benefit and protection of the successor[f]. The mischief is therefore sufficiently suppressed by vacating them after the determination of the interest of the grantors; but the leases, during their continuance, [88] being not within the mischief, are not within the remedy.

2. A STATUTE, which treats of things or persons of an inferior rank, cannot by any *general words* be extended to those of a superior. So a statute, treating of "deans, pre-"bendaries, parsons, vicars, *and others having spiritual pro-"motion*," is held not to extend to bishops, though they have spiritual promotion; deans being the highest persons named (17), and bishops being of a still higher order[g].

3. PENAL statutes must be construed strictly. Thus the statute 1 Edw. VI. c. 12. having enacted that those who are convicted of stealing *horses* should not have the benefit of clergy, the judges conceived that this did not extend to him that should steal but one *horse* (18), and therefore procured a

[f] Co. Litt. 45. 3 Rep. 60. 10 Rep. 58. [g] 2 Rep. 46.

(17) This construction must be presumed to be most conformable to the intention of the legislature.

(18) Lord Hale thinks, that the scruple of the judges did not merely depend upon the words being in the plural number, because no doubt had ever occurred respecting former statutes in the plural number; as, for instance, it was enacted by the 32 Hen. VIII. c. 1. that no person convicted of burning *any dwelling houses* should be admitted to clergy. But the reason of the difficulty in this case was, because the statute of 37 Hen. VIII. c. 8. was expressly penned in the singular number; *If any man do steal any horse, mare, or filly:* and then this statute thus varying the number, and at the same time expressly repealing all other exclusions of clergy introduced since the beginning of the reign of Hen. VIII. it raised a doubt, whether it were not intended by the legislature to restore

new act for that purpose in the following year[h]. And, to come nearer our own times, by the statute 14 Geo. II. c. 6. stealing sheep, *or other cattle*, was made felony without benefit of clergy. But these general words, "or other cattle," being looked upon as much too loose to create a capital offence, the act was held to extend to nothing but mere sheep. And therefore, in the next sessions, it was found necessary to make another statute, 15 Geo. II. c. 34. extending the former to bulls, cows, oxen, steers, bullocks, heifers, calves, and lambs by name.

4. STATUTES against frauds (19) are to be liberally and beneficially expounded. This may seem a contradiction to

h 2 and 3 Edw. VI. c. 33. Bac. Elem. c. 12.

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clergy where only one horse was stolen. 2 *H. P. C.* 365. And it has since been decided, that where statutes use the plural number, a single instance in such cases will be comprehended; as the statute 2 Geo. II. c. 25. s. 3. enacts, that it shall be felony to steal *any bank notes*, and it has been adjudged to be felony to steal one bank note. *Leach* 1. *Nassel's Case.*

(19) These are generally called remedial statutes. And it is a fundamental rule of construction, that penal statutes shall be construed strictly, and remedial statutes shall be construed liberally. It was one of the laws of the twelve tables of Rome, that whenever there was a question between liberty and slavery, the presumption should be on the side of liberty. This excellent principle our law has adopted in the construction of penal statutes: for whenever any ambiguity arises in a statute introducing a new penalty or punishment, the decision shall be on the side of lenity and mercy; or in favour of natural right and liberty: or, in other words, the decision shall be according to the strict letter in favour of the subject. And though the judges in such cases may frequently raise and solve difficulties contrary to the intention of the legislature, yet no further inconvenience can result, than that the law remains as it was before the statute. And it is more consonant to principles of liberty, that the judge should acquit whom the legislator intended to punish, than that he should punish whom the legislator intended to discharge with impunity. But remedial

the last rule; most statutes against frauds being in their consequences penal. But this difference is here to be taken: where the statute acts upon the offender, and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly: but when the statute acts upon the offence, by setting aside the fraudulent transaction (20), here it is to be construed liberally. Upon this footing the statute of 13 Eliz. c. 5. which avoids all gifts of goods, &c. made to defraud creditors *and others*, was held to extend by the general words to a gift made to defraud the queen of a forfeiture[1]. [89]

5. One part of a statute must be so construed by another, that the whole may (if possible) stand: *ut res magis valeat, quam pereat.* As if land be vested in the king and his heirs by act of parliament, saving the right of A; and A has at that time a lease of it for three years: here A shall hold it for his term of three years, and afterwards it shall go to the

[1] 3 Rep. 82.

statutes must be construed according to the spirit: for in giving relief against fraud, or in the furtherance and extension of natural right and justice, the judge may safely go even beyond that which existed in the minds of those who framed the law.

(20) And therefore it has been held, that the same words in a statute will bear different interpretations according to the nature of the suit or prosecution instituted upon them. As by the 9 Ann. c. 14. the statute against gaming; if any person shall lose at any time or sitting 10*l.* and shall pay it to the winner, he may recover it back within three months; and if the loser does not within that time, any other person may sue for it, and treble the value besides. So where an action was brought to recover back fourteen guineas, which had been won and paid after a continuance at play, except an interruption during dinner, the court held the statute was remedial, as far as it prevented the effects of gaming, without inflicting a penalty, and therefore, in this action, they considered it one time or sitting; but they said, if an action had been brought by a common informer for the penalty, they would have construed it strictly in favour of the defendant, and would have held, that the money had been lost at two sittings. 2 *Bl. Rep.* 1226.

king. For this interpretation furnishes matter for every clause of the statute to work and operate upon. But,

6. A SAVING, totally repugnant to the body of the act, is void. If therefore an act of parliament vests land in the king and his heirs, saving the right of all persons whatsoever; or vests the land of A in the king, saving the right of A: in either of these cases the saving is totally repugnant to the body of the statute, and (if good) would render the statute of no effect or operation; and therefore the saving is void, and the land vests absolutely in the king[k].

7. WHERE the common law and a statute differ, the common law gives place to the statute, and an old statute gives place to a new one. And this upon a general principle of universal law, that "*leges posteriores priores contrarias abrogant:*" consonant to which it was laid down by a law of the twelve tables at Rome, that "*quod populus postremum jussit, id jus ratum esto.*" But this is to be understood, only when the latter statute is couched in negative terms, or where its matter is so clearly repugnant, that it necessarily implies a negative. As if a former act says, that a juror upon such a trial shall have twenty pounds a year; and a new statute afterwards enacts, that he shall have twenty marks: here the latter statute, though it does not express, yet necessarily implies a negative, and virtually repeals the former. For if twenty marks be made qualification sufficient, the former statute which requires twenty pounds is at an end[l]. But if both acts be merely affirmative, and the substance such that both may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy. If by a former law an offence be indictable at the quarter-sessions, and a latter law makes the same offence indictable at the assizes; here the jurisdiction of the sessions is not taken away, but both have a concurrent jurisdiction, and the offender may be prosecuted at either:

[90]

k 1 Rep. 47. l Jenk. Cent. 2. 73.

unless the new statute subjoins express negative words, as, that the offence shall be indictable at the assizes, *and not elsewhere*[m].

8. If a statute, that repeals another, is itself repealed afterwards, the first statute is hereby revived, without any formal words for that purpose. So when the statutes of 26 and 35 Hen. VIII, declaring the king to be the supreme head of the church, were repealed by a statute 1 and 2 Philip and Mary, and this latter statute was afterwards repealed by an act of 1 Eliz. there needed not any express words of revival in queen Elizabeth's statute, but these acts of king Henry were impliedly and virtually revived[n].

9. Acts of parliament derogatory from the power of subsequent parliaments bind not. So the statute 11 Hen. VII. c. 1. which directs that no person for assisting a king *de facto*, shall be attainted of treason by act of parliament or otherwise, is held to be good only as to common prosecutions for high treason; but will not restrain or clog any parliamentary attainder[o]. Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if its ordinances could bind a subsequent parliament. And upon the same principle Cicero, in his letters to Atticus, treats with a proper contempt these restraining clauses, which endeavour to tie up the hands of succeeding legislatures. "When you repeal "the law itself, says he, you at the same time repeal [91] "the prohibitory clause, which guards against such "repeal[p]."

10. Lastly, acts of parliament that are impossible to be performed are of no validity: and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral

m 11 Rep. 63.
n 4 Inst. 325.
o 4 Inst. 43.
p Cum lex abrogatur, illud ipsum abrogatur, quo non eam abrogari oporteat. l. 3. ep. 23.

consequences, void (21). I lay down the rule with these restrictions; though I know it is generally laid down more largely, that acts of parliament contrary to reason are void. But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution, that is vested with authority to control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that, where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government. But where some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it. Thus if an act of parliament gives a man power to try all causes, that arise within his manor of Dale; yet, if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrels. But, if we could conceive it possible for the parliament to enact, that he should try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no.

q 8 Rep. 118.

(21) If an act of parliament is clearly and unequivocally expressed, with all deference to the learned Commentator, I conceive it is neither void in its direct nor collateral consequences, however absurd and unreasonable they may appear. If the expression will admit of doubt, it will not then be presumed that that construction can be agreeable to the intention of the legislature, the consequences of which are unreasonable; but where the signification of a statute is manifest, no authority less than that of parliament can restrain its operation.

THESE are the several grounds of the laws of England: over and above which, equity is also frequently called in to assist, to moderate, and to explain them. What [92] equity is, and how impossible in its very essence to be reduced to stated rules, hath been shewn in the preceding section. I shall therefore only add, that (besides the liberality of sentiment with which our common law judges interpret acts of parliament, and such rules of the unwritten law as are not of a positive kind) there are also peculiar courts of equity established for the benefit of the subject; to detect latent frauds and concealments, which the process of the courts of law is not adapted to reach; to enforce the execution of such matters of trust and confidence, as are binding in conscience, though not cognisable in a court of law; to deliver from such dangers as are owing to misfortune or oversight; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive or common law. This is the business of our courts of equity, which however are only conversant in matters of property. For the freedom of our constitution will not permit, that in criminal cases a power should be lodged in any judge, to construe the law otherwise than according to the letter. This caution, while it admirably protects the public liberty, can never bear hard upon individuals. A man cannot suffer *more* punishment than the law assigns, but he may suffer *less*. The laws cannot be strained by partiality to inflict a penalty beyond what the letter will warrant; but, in cases where the letter induces any apparent hardship, the crown has the power to pardon.

SECTION THE FOURTH.

OF THE COUNTRIES SUBJECT TO THE LAWS OF ENGLAND.

THE kingdom of England, over which our municipal laws have jurisdiction, includes not, by the commmon law, either Wales, Scotland, or Ireland, or any other part of the king's dominions, except the territory of England only. And yet the civil laws and local customs of this territory do now obtain, in part or in all, with more or less restrictions, in these and many other adjacent countries; of which it will be proper first to take a review, before we consider the kingdom of England itself, the original and proper subject of these laws.

WALES had continued independent of England, unconquered and uncultivated, in the primitive pastoral state which Cæsar and Tacitus ascribe to Britain in general, for many centuries; even from the time of the hostile invasions of the Saxons, when the ancient and christian inhabitants of the island retired to those natural intrenchments, for protection from their pagan visitants. But when these invaders themselves were converted to christianity, and settled into regular and potent governments, this retreat of the ancient Britons grew every day narrower; they were over-run by little and little, gradually driven from one fastness to another, and by repeated losses abridged of their wild independence. Very early in our history we find their princes doing homage to the crown of England; till at length in the reign of Edward the First, who may justly be styled the conqueror of

Wales, the line of their ancient princes was abolished, and the king of England's eldest son became, as a matter of course (1), their titular prince; the territory of Wales being then entirely re-annexed (by a kind of feodal resumption) to the dominion of the crown of England[a]; or, as the statute (2) of Rhudhlan[b] expresses it, "*terra Walliae cum incolis suis, "prius regi jure feodali subjecta*, (of which homage was the "sign,) *jam in proprietatis dominium totaliter et cum integri-"tate conversa est, et coronae regni Angliae tanquam pars "corporis ejusdem annexa et unita.*" By the statute also of Wales[c] very material alterations were made in divers parts of their laws, so as to reduce them nearer to the English standard, especially in the forms of their judicial proceedings: but they still retained very much of their original polity; particularly their rule of inheritance, *viz.* that their lands were divided equally among all the issue male, and did not descend to the eldest son alone. By other subsequent statutes their provincial immunities were still farther abridged: but the finishing stroke to their independency was

a Vaugh. 400. b 10 Edw. I. c 12 Edw. I.

(1) It cannot be said that the king's eldest son became prince of Wales by any necessary or natural consequence; but for the origin and creation of his title, see p. 224.

(2) The learned Judge has made a mistake in referring to the statute, which is called the statute of Rutland, in the 10 Ed. I. which does not at all relate to Wales. But the statute of Rutland, as it is called in *Vaughan* (p. 400.) is the same as the *Statutum Walliæ*. Mr. Barrington, in his Observations on the Ancient Statutes, (p. 74.) tells us, that the *Statutum Walliæ* bears date *apud Rothelanum*, what is now called Rhuydland in Flintshire. Though Edward says, that *terra Walliæ prius regi jure feodali subjecta*, yet Mr. Barrington assures us, that the feudal law was then unknown in Wales, and that "there are at present in North "Wales, and it is believed in South Wales, no copyhold tenures, and "scarcely an instance of what we call manerial rights; but the pro-"perty is entirely free and allodial. Edward, however, was a con-"queror, and he had a right to make use of his own words in the "preamble to his law." *Ib.* 75.

given by the statute 27 Hen. VIII. c. 26. which at the same time gave the utmost advancement to their civil prosperity, by admitting them to a thorough communication of laws with the subjects of England. Thus were this brave people gradually conquered into the enjoyment of true liberty; being insensibly put upon the same footing, and made fellow-citizens with their conquerors. A generous method of triumph, which the republic of Rome practised with great success, till she reduced all Italy to her obedience, by admitting the vanquished states to partake of the Roman privileges.

It is enacted by this statute 27 Hen. VIII. 1. That the dominion of Wales shall be for ever united to the kingdom of England. 2. That all Welshmen born shall have the same liberties as other the king's subjects. 3. That lands in Wales shall be inheritable according to the English tenures and rules of descent. 4. That the laws of England, and no [95] other, shall be used in Wales: besides many other regulations of the police of this principality. And the statute 34 & 35 Hen. VIII. c. 26. confirms the same, adds farther regulations, divides it into twelve shires (3), and, in short, reduces it into the same order in which it stands at this day; differing from the kingdom of England in only a few particulars, and those too of the nature of privileges, (such as having courts within itself, independent of the process of Westminster-hall, and some other immaterial peculiarities, hardly more than are to be found in many counties of England itself.

The kingdom of Scotland, notwithstanding the union of the crowns on the accession of their king James VI. to that of England, continued an entirely separate and distinct king-

(3) By this union of Wales with England, twenty-seven members were added to the English house of commons. By the 27 Hen. VIII. c. 26. the county of Monmouth (which till that time had been part of Wales) was enabled to send two members to parliament; but the other counties and the towns in Wales represented in parliament had the privilege granted of returning one only.

dom for above a century more, though an union had been long projected; which was judged to be the more easy to be done, as both kingdoms were anciently under the same government, and still retained a very great resemblance, though far from an identity, in their laws. By an act of parliament 1 Jac. I. c. 1. it is declared that these two mighty, famous, and ancient kingdoms were formerly one. And sir Edward Coke observes[d], how marvellous a conformity there was, not only in the religion and language of the two nations, but also in their ancient laws, the descent of the crown, their parliaments, their titles of nobility, their officers of state and of justice, their writs, their customs, and even the language of their laws. Upon which account he supposes the common law of each to have been originally the same; especially as their most ancient and authentic book, called *regiam majestatem*, and containing the rules of *their* ancient common law, is extremely similar to that of Glanvil, which contains the principles of *ours*, as it stood in the reign of Henry II. And the many diversities subsisting between the two laws at present, may be well enough accounted for, from a diversity of practice in two large and uncommunicating jurisdictions, and from the acts of two distinct and independent parliaments, which have in many points altered and abrogated the old common law of both kingdoms (4).

d 4 Inst. 345.

(4) The laws in Scotland concerning the tenures of land, and of consequence the constitution of parliaments and the royal prerogatives, were founded upon the same feudal principles as the laws respecting the subjects in England. It is said, that the feudal polity was established first in England; and was afterwards introduced into Scotland in imitation of the English government. But it continued in its original form much longer in Scotland than it did in England, and the changes in the Scotch government, probably owing to the circumstance that they are more recent, are far more distinctly marked and defined than they are in the history of the English con-

HOWEVER, sir Edward Coke, and the politicians of that time, conceived great difficulties in carrying on the projected union: but these were at length overcome, and the great

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stitution. And perhaps the progress of the Scotch parliaments affords a clearer elucidation of the obscure and ambiguous points in the history of the representation and constitution of our country, than any arguments or authorities that have yet been adduced. But a particular discussion of this subject would far exceed the limits of a note, and will be reserved for a future occasion. But for an account of the parliament of Scotland before the union, and of the laws relative to the election of the representative peers and commoners of Scotland, I shall refer the studious reader to Mr. Wight's valuable *Inquiry into the Rise and Progress of Parliaments chiefly in Scotland.* (Quarto ed.) It is supposed, that we owe the lower house of parliament in England, to the accidental circumstance that the barons and the representatives of the counties and boroughs had not a room large enough to contain them all; but in Scotland, the three estates assembled always in one house, had one common president, and deliberated jointly upon all matters that came before them, whether of a judicial or of a legislative nature. (*Wight*, 82.) In England, the lords spiritual were always styled one of the three estates of the realm; but there is no authority that they ever voted in a body distinct from the lords temporal. In the Scotch parliament the three estates were, 1. The bishops, abbots, and other prelates who had a seat in parliament, as in England, on account of their benefices, or rather lands, which they held *in capite*, i. e. immediately of the crown: 2. The barons, and the commissioners of shires, who were the representatives of the smaller barons, or the free tenants of the king: 3. The burgesses, or the representatives of the royal boroughs. Craig assures us, *nihil ratum esse, nihil legis vim habere, nisi quod omnium trium ordinum consensu conjuncto constitutum est; ita tamen ut uniuscujusque ordinis per se major pars consentiens pro toto ordine sufficiat. Scio hodie controverti, an duo ordines dissentiente tertio, quasi major pars leges condere possint; cujus partem negantem boni omnes, et quicunque de hac re scripserunt pertinacissimè tuentur, alioqui duo ordines in eversionem tertii possint consentire.* (De Feudis, lib. i. Dieg. 7. s. 11.) But some writers have since presumed to controvert this doctrine. (*Wight*, 83.) It is strange that a great fundamental point, which was likely to occur frequently, should remain a subject of doubt and controversy. But we should now be inclined to think, that a majority of one of the estates could

work was happily effected in 1707, 6 Anne; when twenty-five articles of union were agreed to by the parliaments of both nations; the purport of the most considerable being as follows:

1. THAT on the first of May 1707, and for ever after, the kingdoms of England and Scotland shall be united into one kingdom, by the name of Great Britain.

2. THE succession to the monarchy of Great Britain shall be the same as was before settled with regard to that of England.

3. THE united kingdom shall be represented by one parliament.

4. THERE shall be a communication of all rights and privileges between the subjects of both kingdoms, except where it is otherwise agreed.

9. WHEN England raises 2,000,000*l.* (5) by a land tax, Scotland shall raise 48,000*l.*

16, 17. THE standards of the coin, of weights, and of measures, shall be reduced to those of England, throughout the united kingdoms.

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not have resisted a majority of each of the other two, as it cannot easily be supposed, that a majority of the spiritual lords would have consented to those statutes, which, from the year 1587 to the year 1690, were enacted for their impoverishment, and finally for their annihilation. At the time of the union, the Scotch parliament consisted only of the other two estates. With regard to laws concerning contracts and commerce, and perhaps also crimes, the law of Scotland is in a great degree conformable to the civil law; and this, probably, was owing to their frequent alliances and connections with France and the continent, where the civil law chiefly prevailed.

(5) Accurately, 1,997,763*l.* 8*s.* 4$\frac{1}{4}$*d.* the sum raised by a land tax of 4*s.* in the pound.

18. THE laws relating to trade, customs, and the excise, shall be the same in Scotland as in England. But all the other laws of Scotland shall remain in force: though alterable by the parliament of Great Britain. Yet with this caution: that laws relating to public policy are alterable at the discretion of the parliament; laws relating to private right are not to be altered but for the evident utility of the people of Scotland.

[97] 22. SIXTEEN peers are to be chosen to represent the peerage of Scotland in parliament, and forty-five members to sit in the house of commons (6).

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(6) By the 25th article it is agreed, that all laws and statutes in either kingdom, so far as they are contrary to these articles, shall cease and become void. From the time of Edw. IV. till the reign of Ch. II. both inclusive, our kings used frequently to grant, by their charter only, a right to unrepresented towns of sending members to parliament. The last time this prerogative was exercised, was in the 29 Ch. II. who gave this privilege to Newark; and it is remarkable, that it was also the first time that the legality of this power was questioned in the house of commons, but it was then acknowledged by a majority of 125 to 73. (*Comm. Jour.* 21 *March* 1676-7.) But notwithstanding it is a general rule in our law, that the king can never be deprived of his prerogatives, but by the clear and express words of an act of parliament; yet it has been thought, from this last article in the act of union, that this prerogative of the crown is virtually abrogated, as the exercise of it would necessarily destroy the proportion of the representatives for the two kingdoms. (See 1 *Doug. El. Cases*, 70. *The Preface to Glanv. Rep. and Simeon's Law of Elect.* 91.) It was also agreed, that the mode of the election of the peers and commons should be settled by an act passed in the parliament of Scotland, which was afterwards recited, ratified, and made part of the act of union. And by that statute it was enacted, that of the 45 commoners, 30 should be elected by the shires, and 15 by the boroughs; that the city of Edinburgh should elect one, and that the other royal boroughs should be divided into fourteen districts, and that each district should return one. It was also provided, that no person should elect or be elected

23. THE sixteen peers of Scotland shall have all privileges of parliament: and all peers of Scotland shall be peers of Great Britain, and rank next after those of the same degree at the time of the union, and shall have all privileges of peers, except sitting in the house of lords, and voting on the trial of a peer (7).

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one of the 45, but who would have been capable of electing, or of being elected, a representative of a shire or a borough to the parliament of Scotland. Hence the eldest son of any Scotch peer cannot be elected one of the 45 representatives; for by the law of Scotland, prior to the union, the eldest son of a Scotch peer was incapable of sitting in the Scotch parliament. (*Wight*, 269.) There seems to be no satisfactory reason for this restriction, which would not equally extend to the exclusion of all the other sons of a peer. Neither can such eldest son be entitled to be enrolled and vote as a freeholder for any commissioner of a shire, though otherwise qualified, as was lately determined by the house of lords in the case of lord Daer, March 26, 1793. But the eldest sons of Scotch peers may represent any place in England, as many do. (2 *Hats. Prec.* 12.) The two statutes, 9 Ann. c. 5. and 33 Geo. II. c. 20. requiring knights of shires and members for boroughs to have respectively 600*l.* and 300*l.* a year, are expressly confined to England. But a commissioner of a shire must be a freeholder, and it is a general rule that none can be elected, but those who can elect. (*Wight*, 289.) And till the contrary was determined by a committee of the house of commons in the case of Wigtown in 1775, (2 *Doug.* 181.) it was supposed that it was necessary that every representative of a borough should be admitted a burgess of one of the boroughs which he represented. (*Wight*, 404.) It still holds generally true in shires in Scotland, that the qualifications of the electors and elected are the same; or that eligibility and a right to elect are convertible terms. Upon some future occasion I shall endeavour to prove, that, in the origin of representation, they were universally the same in England.

(7) Since the union, the following orders have been made in the house of lords respecting the peerage of Scotland. Queen Anne, in the seventh year of her reign, had created James duke of Queensbury duke of Dover, with remainder in tail to his second son, then earl of Solway

THESE are the principal of the twenty-five articles of union, which are ratified and confirmed by statute 5 Ann. c. 8. in which statute there are also two acts of parliament

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in Scotland; and upon the 21st of January 1708-9, it was resolved by the lords, that a peer of Scotland claiming to sit in the house of peers by virtue of a patent passed under the great seal of Great Britain, and who now sits in the parliament of Great Britain, had no right to vote in the election of the sixteen peers who are to represent the peers of Scotland in parliament.

The duke of Hamilton having been created duke of Brandon, it was resolved by the lords on the 20th of December 1711, that no patent of honour granted to any peer of Great Britain, who was a peer of Scotland at the time of the union, should entitle him to sit in parliament. Notwithstanding this resolution gave great offence to the Scotch peerage, and to the queen and her ministry, yet a few years afterwards, when the duke of Dover died, leaving the earl of Solway, the next in remainder, an infant, who, upon his coming of age, petitioned the king for a writ of summons as duke of Dover; the question was again argued on the 18th of December 1719, and the claim as before disallowed. (See the argument, 1 *P. Wms.* 582.) But in 1782 the duke of Hamilton claimed to sit as duke of Brandon, and the question being referred to the judges, they were unanimously of opinion, that the peers of Scotland are not disabled from receiving, subsequently to the union, a patent of peerage of Great Britain, with all the privileges usually incident thereto. Upon which the lords certified to the king, that the writ of summons ought to be allowed to the duke of Brandon, who now enjoys a seat as a British peer. (6th June 1782.) But there never was any objection to an English peer's taking a Scotch peerage by descent; and therefore, before the last decision, when it was wished to confer an English title upon a noble family of Scotland, the eldest son of the Scotch peer was created in his father's life-time an English peer, and this creation was not affected by the annexation by inheritance of the Scotch peerage. On the 13th February 1787, it was resolved, that the earl of Abercorn and the duke of Queensbury, who had been chosen of the number of the sixteen peers of Scotland, having been created peers

recited; the one of Scotland, whereby the church of Scotland and also the four universities of that kingdom are established for ever, and all succeeding sovereigns are to take an oath inviolably to maintain the same; the other of England, 5 Ann. c. 6. whereby the acts of uniformity of 13 Eliz. and 13 Car. II. (except as the same had been altered by parliament at that time) and all other acts then in force for the preservation of the church of England, are declared perpetual; and it is stipulated that every subsequent king and queen shall take an oath inviolably to maintain the same within England, Ireland, Wales, and the town of Berwick upon Tweed. And it is enacted, that these two acts "shall for ever be "observed as fundamental and essential conditions of the "union."

Upon these articles and act of union, it is to be observed, 1. That the two kingdoms are now so inseparably united, that nothing can ever disunite them again; except the mutual consent of both, or the successful resistance of either, upon apprehending an infringement of those points which, when they were separate and independent nations, it was mutually stipulated should be "fundamental and essential conditions of the

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of Great Britain, thereby ceased to sit in that house as representatives of the peerage. See the argument in *Ann. Reg.* for 1787, p. 95. At the election occasioned by the last resolution, the dukes of Queensbury and Gordon had given their votes as peers of Scotland, contrary to the resolution of 1709; in consequence of which it was resolved 18th May 1787, that a copy of that resolution should be transmitted to the lord register of Scotland as a rule for his future proceeding in cases of election.

The duke of Queensbury and marquis of Abercorn had tendered their votes at the last general election, and their votes were rejected; but notwithstanding the former resolutions, on 23d May 1793, it was resolved, that if duly tendered they ought to have been counted.

"union[e]." 2. That whatever else may be deemed "fun-"damental and essential conditions," the preservation of the two churches of England and Scotland, in the same state that they were in at the time of the union, and the maintenance of the acts of uniformity which establish our common prayer, are expressly declared so to be. 3. That therefore any alteration in the constitution of either of those churches, or in the liturgy of the church of England, (unless with the consent of the respective churches, collectively or representatively given,) would be an infringement of these "fundamental and "essential conditions," and greatly endanger the union. 4. That the municipal laws of Scotland are ordained to be still observed in that part of the island, unless altered by parliament; and, as the parliament has not yet thought proper, except in a few instances, to alter them, they still (with regard to the particulars unaltered) continue in full force. Wherefore the municipal or common laws of England are,

e It may justly be doubted, whether even such an infringement (though a manifest breach of good faith, unless done upon the most pressing necessity) would of itself dissolve the union: for the bare idea of a state, without a power somewhere vested to alter every part of its laws, is the height of political absurdity. The truth seems to be, that in such an *incorporate union* (which is well distinguished by a very learned prelate from a *foederate alliance* where such an infringement would certainly rescind the compact) the two contracting states are totally annihilated, without any power of a revival; and a third arises from their conjunction, in which all the rights of sovereignty, and particularly that of legislation, must of necessity reside. (See Warburton's alliance, 198.) But the wanton or imprudent exertion of this right would probably raise a very alarming ferment in the minds of individuals; and therefore it is hinted above that such an attempt might *endanger* (though by no means *destroy*) the union.

To illustrate this matter a little farther: an act of parliament to repeal or alter the act of uniformity in England, or to establish episcopacy in Scotland, would doubtless in point of authority be sufficiently valid and binding; and, notwithstanding such an act, the union would continue unbroken. Nay, each of these measures might be safely and honourably pursued, if respectively agreeable to the sentiments of the English church, or the kirk in Scotland. But it should seem neither prudent, nor perhaps consistent with good faith, to venture upon either of those steps, by a spontaneous exertion of the inherent powers of parliament, or at the instance of mere individuals. So sacred indeed are the laws above-mentioned (for protecting each church and the English liturgy) esteemed, that in the regency acts both of 1751 and 1765 the regents are expressly disabled from assenting to the repeal or alteration of either these, or the act of settlement.

generally speaking, of no force or validity in Scotland (8); and of consequence in the ensuing commentaries, we shall have very little occasion to mention, any farther than sometimes by way of illustration, the municipal laws of that part of the united kingdoms.

THE town of Berwick upon Tweed was originally [99] part of the kingdom of Scotland; and, as such, was for a time reduced by king Edward I. into the possession of the crown of England: and during such its subjection, it received from that prince a charter, which (after its subsequent cession by Edward Balliol, to be for ever united to the crown and realm of England) was confirmed by king Edward III, with some additions; particularly that it should be governed by the laws and usages which it enjoyed during the time of king Alexander, that is, before its reduction by Edward I. Its constitution was new-modelled, and put upon an English footing by a charter of king James I: and all its liberties, franchises, and customs, were confirmed in parliament by the statutes 22 Edw. IV. c. 8. and 2 Jac. I. c. 28. Though therefore it hath some local peculiarities, derived from the ancient laws of Scotland[f], yet it is clearly part of the realm of England, being represented by burgesses in the house of commons, and bound by all acts of the British parliament, whether specially named or otherwise. And therefore it was (perhaps superfluously) declared by statute 20 Geo. II. c. 42. that, where England only is mentioned in any act of parliament, the same notwithstanding hath and shall

[f] Hale Hist. C. L. 193. 1 Sid. 382. 462. 2 Show. 365.

(8) Acts of parliament in general passed since the union, extend to Scotland; but where a statute is not applicable to Scotland, and where Scotland is not intended to be included, the method is to declare by *proviso* that it does not extend to Scotland. 3 *Burr.* 853.

be deemed to comprehend the dominion of Wales and town of Berwick upon Tweed. And though certain of the king's writs or processes of the courts of Westminster do not usually run into Berwick, any more than the principality of Wales, yet it hath been solemnly adjudged[g] that all prerogative writs (as those of *mandamus*, prohibition, *habeas corpus*, *certiorari*, &c.) may issue to Berwick as well as to every other of the dominions of the crown of England, and that indictments and other local matters arising in the town of Berwick may be tried by a jury of the county of Northumberland (9).

As to Ireland, that is still a distinct kingdom; though a dependent subordinate kingdom. It was only entitled the dominion or lordship of Ireland[h], and the king's style [100] was no other than *dominus Hiberniae*, lord of Ireland, till the thirty-third year of king Henry the eighth; when he assumed (10) the title of king, which is recognised by act of parliament 35 Hen. VIII. c. 3. But, as Scotland and England are now one and the same kingdom, and yet differ in their municipal laws; so England and Ireland are, on the other hand, distinct kingdoms, and yet in general agree in their laws. The inhabitants of Ireland are, for the most part, descended from the English, who planted it as a kind of colony, after the conquest of it by king Henry the second: and the laws of England were then received and

g Cro. Jac. 543. 2 Roll. abr. 292. Stat. 11 Geo. I. c. 4. 4 Burr. 834.

h Stat. Hiberniae. 14 Hen. III.

(9) See the case of the King v. Cowle, in 2 *Burr.* 834. in which Lord Mansfield seems to have collected and methodized all the learning respecting the constitution of the town of Berwick upon Tweed.

(10) The title of king was conferred upon him and his successors by a statute passed in Ireland expressly for that purpose, and it was made treason for any inhabitant of Ireland to deny it. 33 *Hen. VIII.* c. 1. *Irish Stat.*

sworn to by the Irish nation, assembled at the council of Lismore[i]. And as Ireland, thus conquered, planted, and governed, still continues in a state of dependence, it must necessarily conform to, and be obliged by, such laws as the superior state thinks proper to prescribe.

At the time of this conquest the Irish were governed by what they called the Brehon law, so styled from the Irish name of judges, who were denominated Brehons[k]. But king John in the twelfth year of his reign went into Ireland and carried over with him many able sages of the law; and there by his letters patent, in right of the dominion of conquest, is said to have ordained and established that Ireland should be governed by the laws of England[l]: which letters patent sir Edward Coke[m] apprehends to have been there confirmed in parliament. But to this ordinance many of the Irish were averse to conform, and still stuck to their Brehon law: so that both Henry the third[n] and Edward the first[o] were obliged to renew the injunction; and at length in a parliament holden at Kilkenny, 40 Edw. III. under Lionel duke of Clarence, and then lieutenant of Ireland, the Brehon law was formally abolished, it being unanimously declared to be indeed no law, but a lewd custom crept in of later times. And yet, even in the reign of queen Eliza- [101] beth, the wild natives still kept and preserved their Brehon law; which is described[p] to have been "a rule of "right unwritten, but delivered by tradition from one to "another, in which oftentimes there appeared great shew of "equity in determining the right between party and party,

i Pryn. on 4 Inst. 249.

k 4 Inst. 358. Edm. Spenser's state of Ireland. p. 1513. edit. Hughes.

l Vaugh. 394. 2 Pryn. Rec. 85. 7 Rep. 23.

m 1 Inst. 141.

n A. R. 30. 1 Rym. Feod. 442.

o A. R. 5. pro eo quod leges quibus utuntur Hyberniei Deo detestabiles existunt, et omni juri dissonant, adeo quod leges censeri non debeant; nobis et consilio nostro satis videtur expediens, eisdem utendas concedere leges Anglicanas. 3 Pryn. Rec. 1218.

p Edm. Spenser, ibid.

"but in many things repugnant quite both to God's laws and "man's." The latter part of this character is alone ascribed to it, by the laws before-cited of Edward the first and his grandson.

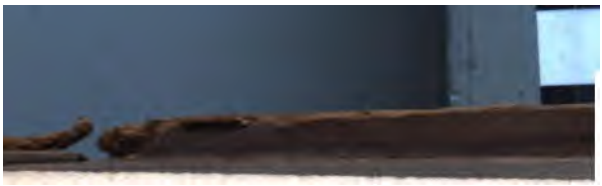
But as Ireland was a distinct dominion, and had parliaments of its own, it is to be observed, that though the immemorial customs, or common law, of England were made the rule of justice in Ireland also, yet no acts of the English parliament, since the twelfth of king John, extended into that kingdom; unless it were specially named, or included under general words, such as, "within any of the king's do-"minions." And this is particularly expressed, and the reason given in the year books[q]: "a tax granted by the parlia-"ment of England shall not bind those of Ireland, because "they are not summoned to our parliament;" and again, "Ireland hath a parliament of its own, and maketh and "altereth laws; and our statutes do not bind them, because "they do not send knights to our parliament: but their "persons are the king's subjects, like as the inhabitants of "Calais, Gascoigne, and Guienne, while they continued "under the king's subjection." The general run of laws, enacted by the superior state, are supposed to be calculated for its own internal government, and do not extend to its distant dependent countries, which, bearing no part in the legislature, are not therefore in its ordinary and daily contemplation. But, when the sovereign legislative power sees it necessary to extend its care to any of its subordinate dominions, and mentions them expressly by name or includes them under general words, there can be no doubt but then they are bound by its laws[r].

[102] The original method of passing statutes in Ireland was nearly the same as in England, the chief governor holding parliaments at his pleasure, which enacted such laws as they thought proper[s]. But an ill use being made of this

q 20 Hen. VI. 8. 2 Ric. III. 12.

r Year book 1 Hen. VII. 3. 7 Rep. 22. Calvin's case.

s Irish Stat. 11 Eliz. st. 3. c. 8.



liberty particularly by lord Gormanstown, deputy-lieutenant in the reign of Edward IV[t], a set of statutes were there enacted in the 10 Hen. VII. (sir Edward Poynings being then lord deputy, whence they are called Poynings' laws) one of which[u], in order to restrain the power as well of the deputy as the Irish parliament, provides, 1. That before any parliament be summoned or holden, the chief governor and council of Ireland shall certify to the king under the great seal of Ireland the considerations and causes thereof, and the articles of the acts proposed to be passed therein. 2. That after the king, in his council of England, shall have considered, approved, or altered the said acts or any of them, and certified them back under the great seal of England, and shall have given license to summon and hold a parliament, then the same shall be summoned and held; and therein the said acts so certified, and no other, shall be proposed, received, or rejected[w]. But as this precluded any law from being proposed, but such as were pre-conceived before the parliament was in being, which occasioned many inconveniences and made frequent dissolutions necessary, it was provided by the statute of Philip and Mary before-cited, that any new propositions might be certified to England in the usual forms, even after the summons and during the session of parliament. By this means however there was nothing left to the parliament in Ireland, but a bare negative or power of rejecting, not of proposing or altering, any law. But the usage now is, that bills are often framed in either house, under the denomination of "heads for a bill or bills:" and in that shape they are offered to the consideration of the lord lieutenant and privy council: who, upon such parliamentary intimation, or otherwise upon the application of private persons, receive and transmit such heads, or reject them without any transmis- [103] sion, to England. And with regard to Poynings' law in particular, it cannot be repealed or suspended, unless the

t Irish Stat. 10 Hen. VII. c. 23.
u Cap. 4. expounded by 3 and 4 Ph. and M. c. 4.
w 4 Inst. 353.

bill for that purpose, before it be certified to England, be approved by both the houses[x] (12).

x Irish Stat. 11 Eliz. st. 3. c. 38.

(12) The history of the proceedings of the Irish parliament published by lord Mountmorres is a very valuable accession to constitutional learning. It is a publication, which, besides being immediately useful to Ireland, affords much important information to those who are desirous of having a well-grounded and an accurate knowledge of the English constitution; for the public proceedings of the neighbouring kingdoms of Scotland and Ireland furnish strong arguments from analogy, when difficult questions arise respecting the English constitution, and they are sometimes irrefragable evidence of ancient principles which were once common to them all.

Lord Mountmorres observes upon the statute referred to by the learned judge, that to repeal Poynings' law it required the consent of *the greater number of the lords and commons*, which, if it meant any thing, must signify a majority not of those who happened to be present, but of the whole number summoned to parliament; and that the requisition in that sense was strictly complied with in 1782, when Poynings' law was repealed. 1 Vol. p. 53.

I shall here take the liberty to subjoin an extract from what lord Mountmorres calls "a short view of the former, and of the present "method of passing laws and of holding parliaments in Ireland," as it contains a clearer and more authentic account than I could elsewhere collect:

"Before a parliament was held, it was expedient, antecedent to one "thousand seven hundred and eighty-two, that the lord lieutenant and "council should send over an important bill as a reason for summoning "that assembly. This always created violent disputes, and it was "constantly rejected; as a money bill, which originated in the council, "was contrary to a known maxim, that the commons hold the purse of "the nation; and as all grants originate from them, since, in early "times, they were used to consult with their constituents upon the "mode, duration, and quantum of the supply.

"Propositions for laws, or heads of bills, as they are called, ori-"ginated indifferently in either house. After two readings and a "committal, they were sent by the council to England, and were sub-

But the Irish nation being excluded from the benefit of the English statutes, were deprived of many good and profitable laws, made for the improvement of the common law: and the measure of justice in both kingdoms becoming thence no longer uniform, it was therefore enacted, by another

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"mitted, usually by the English privy council, to the attorney and "solicitor general; and from thence they were returned to the council "of Ireland, from whence they were sent to the commons, if they ori- "ginated there, (if not, to the lords,) and after three readings they "were sent up to the house of lords, where they went through the "same stages; and then the lord lieutenant gave the royal assent in "the same form which is observed in Great Britain.

"In all these stages in England and Ireland, it is to be remembered, "that any bill was liable to be rejected, amended, or altered; but that "when they had passed the great seal of England, no alteration could "be made by the Irish parliament.

"At present, by the chief baron Yelverton's law, it is not necessary "for the council to certify a bill under the great seal of Ireland, as a "reason for summoning a parliament, but it is ordered to be convoked "by proclamation from the crown, as it is summoned in England.

"Touching bills, they now originate in either house, and go from "one to the other, as they do in England; after which they are depo- "sited in the lords' office, when the clerk of the crown takes a copy "of them, and this parchment is attested to be a true copy, by the "great seal of Ireland on the left side of the instrument. Thus they "are sent to England by the Irish council, and if they are approved of "by the king, this transmiss, or copy, comes back with the great seal "of England on the right side, with a commission to the lord lieutenant "to give the royal assent. All bills, except money bills, remain in the "lords' office; but bills of supply are sent back to the house of com- "mons to be presented by the speaker at the bar of the lords for the "royal assent. Hence it is manifest, that no alteration can now be "made in bills, except in parliament, as the record, or original roll, "remains in the lords' office till it obtains the royal assent.

"Of the rejection of bills, or not returning them from England, it "is said there are very few instances of such a refusal by the crown "since one thousand seven hundred and eighty-two; though, doubt- "less, the royal negative in both kingdoms is as clear a privilege as "any other prerogative." 1 Vol. 57.

of Poynings' laws[y], that all acts of parliament, before made in England, should be of force within the realm of Ireland[z]. But, by the same rule, that no laws made in England, between king John's time and Poynings' law, were then binding in Ireland, it follows that no acts of the English parliament made since the 10 Hen. VII. do now bind the people of Ireland, unless specially named or included under general words[a]. And on the other hand it is equally clear, that where Ireland is particularly named, or is included under general words, they are bound by such acts of parliament. For this follows from the very nature and constitution of a dependent state: dependence being very little else, but an obligation to conform to the will or law of that superior person or state, upon which the inferior depends. The original and true ground of this superiority, in the present case, is what we usually call, though somewhat improperly, the right of conquest; a right allowed by the law of nations, if not by that of nature; but which in reason and civil policy can mean nothing more, than that, in order to put an end to hostilities, a compact is either expressly or tacitly made between the conqueror and the conquered, that if they will acknowledge the victor for their master, he will treat them for the future as subjects, and not as enemies[b].

But this state of dependence being almost forgotten, and ready to be disputed by the Irish nation, it became necessary some years ago to declare how that matter really stood: and therefore by statute 6 Geo. I. c. 5. it is declared, that the kingdom of Ireland ought to be subordinate to, and [104] dependent upon, the imperial crown of Great Britain, as being inseparably united thereto: and that the king's majesty, with the consent of the lords and commons of Great Britain in parliament, hath power to make laws to bind the people of Ireland(13).

y cap. 22.
z 4 Inst. 351.
a 12 Rep. 112.
b Puff. L. of N. viii. 6. 24.

(13) Prynne in his learned argument has enumerated several statutes made in England from the time of king John, by which

Thus we see how extensively the laws of Ireland communicate with those of England; and indeed such communication is highly necessary, as the ultimate resort from the courts of justice in Ireland is, as in Wales, to those in England: a writ of error (in the nature of an appeal) lying from the king's bench in Ireland to the king's bench in England[c], as the appeal from the chancery in Ireland lies immediately to the house of lords here: it being expressly declared, by the same statute, 6 Geo. I. c. 5. that the peers of Ireland have no jurisdiction to affirm or reverse any judgments or decrees whatsoever (14). The propriety and even necessity, in

c This was law in the time of Hen. VIII; as appears by the ancient book, entitled, *diversity of courts, c. bank le roy.*

Ireland was bound.(8 *St. Tr.* 343.) That was an argument to prove that lord Connor Maguire, baron of Inneskillin in Ireland, who had committed treason in that country, by being the principal contriver and instigator of the Irish rebellion and massacre in the time of Car. I. and who had been brought to England against his will, could be lawfully tried for it in the king's bench at Westminster by a Middlesex jury, and be ousted of his trial by his peers in Ireland, by force of the statute of 35 Hen. VIII. c. 2.

The prisoner having pleaded to the jurisdiction, the court, after hearing this argument, over-ruled the plea, and the decision was approved of by a resolution of the two houses of parliament, and lord Maguire was found guilty, and was afterwards executed at Tyburn as a traitor.

(14) By an act passed in the 22 Geo. III. c. 53. the statute of Geo. I. is simply repealed. But as the statute of Geo. I. was thought to be merely declaratory of the former law, the repeal of it could produce no further operation than to render the law in some degree less clear than that statute had made it. Therefore to produce the intended effect, it required another statute, which was passed in the 23 Geo. III. c. 28. which expressly declared, that in all cases whatever the people of Ireland should be bound only by laws enacted by his majesty and the parliament of that kingdom; and that no appeal or writ of error from any court in Ireland should for the future be brought into any of the courts in England.

all inferior dominions, of this constitution, "that, though "justice be in general administered by courts of their own, "yet that the appeal in the last resort ought to be to the "courts of the superior state," is founded upon these two reasons. 1. Because otherwise the law, appointed or permitted to such inferior dominion, might be insensibly changed within itself, without the assent of the superior. 2. Because otherwise judgments might be given to the disadvantage or diminution of the superiority; or to make the dependence to be only of the person of the king, and not of the crown of England[d] (15).

[d] Vaugh. 402.

(15) The following statement of that great and most important event, the union of Great Britain and Ireland, is extracted from the 39 and 40 Geo. III. c. 77.

In pursuance of his Majesty's most gracious recommendation to the two houses of parliament in Great Britain and Ireland respectively, to consider of such measures as might best tend to strengthen and consolidate the connection between the two kingdoms, the two houses of parliament in each country resolved, that, in order to promote and secure the essential interests of Great Britain and Ireland, and to consolidate the strength, power, and resources of the British Empire, it was adviseable to concur in such measures as should best tend to unite the two kingdoms into one kingdom, on such terms and conditions as should be established by the acts of the respective parliaments in the two countries. And, in furtherance of that resolution, the two houses of each parliament agreed upon eight articles, which, by an address of the respective houses of parliament, were laid before his Majesty for his consideration; and his Majesty having approved of the same, and having recommended it to his Parliaments in Great Britain and Ireland to give full effect to them, they were ratified by an act passed in the parliament of Great Britain on the 2d of July 1800.

Art. I. That the kingdoms of Great Britain and Ireland shall, on the first day of January 1801, and for ever after, be united into one kingdom, by the name of The United Kingdom of Great Britain and Ireland; and that the royal style and titles of the imperial crown, and the ensigns, armorial flags, and banners, shall

WITH regard to the other adjacent islands which [105] are subject to the crown of Great Britain, some of

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be such as should be appointed by his Majesty's royal proclamation.

Art. II. That the succession to the imperial crown shall continue settled in the same manner as the succession to the crown of Great Britain and Ireland stood before limited.

Art. III. That there shall be one parliament, styled, The Parliament of the United Kingdom of Great Britain and Ireland.

Art. IV. That four lords spiritual of Ireland, by rotation of sessions, and 28 lords temporal of Ireland, elected for life by the Peers of Ireland, shall sit in the House of Lords; and 100 commoners, two for each county, two for the city of Dublin, and two for the city of Cork, one for Trinity College, and one for each of the 31 most considerable cities and boroughs, shall be the number to sit in the House of Commons on the part of Ireland.

That questions respecting the rotation or election of the spiritual or temporal peers shall be decided by the House of Lords, and in the case of an equality of votes in the election of a temporal peer, the clerk of the parliament shall determine the election by drawing one of the names from a glass.

That a peer of Ireland, not elected one of the 28, may sit in the House of Commons; but whilst he continues a member of the House of Commons, he shall not be entitled to the privilege of peerage, nor capable of being elected one of the 28, nor of voting at such election, and he shall be sued and indicted for any offence as a commoner.

That as often as three of the peerages of Ireland, existing at the time of the Union, shall become extinct, the king may create one peer of Ireland; and when the peers of Ireland are reduced to 100 by extinction, or otherwise, exclusive of those who shall hold any peerage of Great Britain subsisting at the time of the union, or created of the united kingdom since the union, the king may then create one peer of Ireland for every peerage that becomes extinct, or as often as any one of them is created a peer of the united kingdom, so that the king may always keep up the number of 100 Irish peers, over and above those who have an hereditary seat in the House of Lords.

them (as the isle of Wight, of Portland, of Thanet, &c.) are comprised within some neighbouring county, and are there-

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That questions respecting the election of the members of the House of Commons returned for Ireland, shall be tried in the same manner, as questions respecting the elections for places in Great Britain, subject to such particular regulations as the parliament afterwards shall deem expedient.

That the qualifications by property of the representatives in Ireland, shall be the same respectively as those for counties, cities, and boroughs in England, unless some other provision be afterwards made.

Until an act shall be passed in the parliament of the united kingdom, providing in what cases persons holding offices and places of profit under the crown of Ireland, shall be incapable of sitting in the House of Commons, not more than 20 such persons shall be capable of sitting; and if more than 20 such persons shall be returned from Ireland, then the seats of those above 20 shall be vacated, who have last accepted their offices or places.

That all the lords of parliament on the part of Ireland, spiritual and temporal, sitting in the House of Lords, shall have the same rights and privileges respectively as the peers of Great Britain; and that all the lords spiritual and temporal of Ireland shall have rank and precedency next and immediately after all the persons holding peerages of the like order and degree in Great Britain, subsisting at the time of the union; and that all peerages hereafter created of Ireland, or of the united kingdom, of the same degree, shall have precedency according to the dates of their creations; and that all the peers of Ireland, except those who are members of the House of Commons, shall have all the privileges of peers as fully as the peers of Great Britain, the right and privileges of sitting in the House of Lords, and upon the trial of peers only excepted.

Art. V. That the churches of England and Ireland be united into one protestant episcopal church, to be called, The United Church of England and Ireland; that the doctrine and worship shall be the same; and that the continuance and preservation of the united church as the established church of England and Ireland, shall be deemed an essential and fundamental part of the union; and that, in like manner, the church of Scotland shall remain the same as is now established by law, and by the acts of union of England and Scotland.

fore to be looked upon as annexed to the mother island, and part of the kingdom of England. But there are others which require a more particular consideration.

And, first, the isle of Man is a distinct territory from England, and is not governed by our laws: neither doth any act

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Art. VI. The subjects of Great Britain and Ireland shall be entitled to the same privileges with regard to trade and navigation, and also in respect of all treaties with foreign powers.

That all prohibitions and bounties upon the importation of merchandise from one country to the other shall cease.

But that the importation of certain articles therein enumerated shall be subject to such countervailing duties as are specified in the act.

Art. VII. The sinking funds, and the interest of the national debt, of each country, shall be defrayed by each separately. And, for the space of 20 years after the union, the contribution of Great Britain and Ireland towards the public expenditure in each year, shall be in the proportion of fifteen to two, subject to future regulations.

Art. VIII. All the laws and courts of each kingdom shall remain the same as they are now established, subject to such alterations by the united parliament as circumstances may require; but that all writs of error and appeals shall be decided by the House of Lords of the united kingdom, except appeals from the court of admiralty in Ireland, which shall be decided by a court of delegates appointed by the court of chancery in Ireland.

The statute then recites an act passed in the parliament of Ireland, by which the rotation of the four spiritual lords for each sessions is fixed; and it also directs the time and mode of electing the 28 temporal peers for life; and it provides that 64 county members, two for each county, two for the city of Dublin, two for the city of Cork, one for Trinity College, Dublin, and one for each of 31 cities and towns which are there specified, which are the only places in Ireland to be represented in future. One of the two members of each of those places was chosen by lot, unless the other withdrew his name to sit in the first parliament, but at the next elections, one member only will be returned.

of parliament extend to it, unless it be particularly named therein; and then an act of parliament is binding there[e]. It was formerly a subordinate feudatory kingdom, subject to the kings of Norway; then to king John and Henry III. of England; afterward to the kings of Scotland; and then again to the crown of England: and at length we find king Henry IV, claiming the island by right of conquest, and disposing of it to the earl of Northumberland; upon whose attainder it was granted (by the name of the lordship of Man) to sir John de Stanley by letters patent 7 Henry IV[f]. In his lineal descendants it continued for eight generations, till the death of Ferdinando earl of Derby, *A. D.* 1594: when a controversy arose concerning the inheritance thereof, between his daughters and William his surviving brother: upon which, and a doubt that was started concerning the validity of the original patent[g], the island was seised into the queen's hands, and afterwards various grants were made of it by king James the first; all which being expired or surrendered, it was granted afresh in 7 Jac. I. to William earl of Derby, and the heirs male of his body, with remainder to his heirs general; which grant was the next year confirmed by act of parliament, with a restraint of the power of alienation by the said earl and his issue male. On the death of James earl of Derby, *A. D.* 1735, the male line of earl William failing, the duke of Atholl succeeded to the island as heir general by a female branch. In the mean time, though the title of king had long been disused, the earls of Derby, as lords of Man, had maintained a sort of royal authority therein; by assenting or dissenting to laws, and exercising an appellate jurisdiction. [106] Yet, though no English writ, or process from the courts of Westminster, was of any authority in Man, an appeal lay from a decree of the lord of the island to the king of Great Britain in council[h]. But the distinct jurisdiction of this little subordinate royalty being found inconvenient for the

e 4 Inst. 284. 2 And. 116.
f Selden. tit. hon. 1. 3.
g Camden. Eliz. A. D. 1594.
h 1 P. Wms. 329.

purposes of public justice, and for the revenue, (it affording a commodious asylum for debtors, outlaws, and smugglers,) authority was given to the treasury by statute 12 Geo. I. c. 28. to purchase the interest of the then proprietors for the use of the crown: which purchase was at length completed in the year 1765, and confirmed by statutes 5 Geo. III. c. 26. and 39. (15) whereby the whole island and all its dependencies so granted as aforesaid, (except the landed property of the Atholl family, their manerial rights and emoluments, and the patronage of the bishoprick[i] and other ecclesiastical benefices,) are unalienably vested in the crown, and subjected to the regulations of the British excise and customs.

THE islands of Jersey, Guernsey, Sark, Alderney, and their appendages, were parcel of the dutchy of Normandy, and were united to the crown of England by the first princes of the Norman line. They are governed by their own laws, which are for the most part the ducal customs of Normandy, being collected in an ancient book of very great authority, entitled, *le grand coustumier*. The king's writ, or process from the courts of Westminster, is there of no force; but his commission is. They are not bound by common acts of our parliaments, unless particularly named[k]. All causes are originally determined by their own officers, the bailiffs and jurats of the islands; but an appeal lies from them to the king and council, in the last resort.

BESIDES these adjacent islands, our more distant plantations in America, and elsewhere, are also in some respect subject to the English laws. Plantations or colonies, in distant countries, are either such where the lands [107] are claimed by right of occupancy only by finding them desert and uncultivated, and peopling them from the mother-country; or where, when already cultivated, they

i The bishoprick of Man, or Sodor, or Sodor and Man, was formerly within the province of Canterbury, but annexed to that of York, by statute 33 Hen. VIII. c. 31.

k 4 Inst. 286.

(15) c. 26. is called the vesting act, and c. 39. the regulating act.

have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it hath been held[l], that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject[m], are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue, (such especially as are enforced by penalties,) the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and control of the king in council: the whole of their constitution being also liable to be new-modelled and reformed by the general superintending power of the legislature in the mother-country. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws (16); but, till he does actually change them, the ancient laws of the country remain, unless such

l Salk. 411. 666. m 2 P. Wms. 75.

(16) See an elaborate and learned argument by lord Mansfield, to prove the king's legislative authority by his prerogative alone over a ceded conquered country. *Cowp.* 204.

as are against the law of God, as in the case of an infidel country[n]. Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present inquire), or by [108] treaties. And therefore the common law of England, as such, has no allowance or authority there; they being no part of the mother-country, but distinct (though dependent) dominions. They are subject, however, to the control of the parliament; though (like Ireland, Man, and the rest) not bound by any acts of parliament, unless particularly named.

With respect to their interior polity, our colonies are properly of three sorts. 1. Provincial establishments, the constitutions of which depend on the respective commissions issued by the crown to the governors, and the instructions which usually accompany those commissions; under the authority of which, provincial assemblies are constituted, with the power of making local ordinances, not repugnant to the laws of England. 2. Proprietary governments, granted out by the crown to individuals, in the nature of feudatory principalities, with all the inferior regalities, and subordinate powers of legislation, which formerly belonged to the owners of counties palatine: yet still with these express conditions, that the ends for which the grant was made be substantially pursued, and that nothing be attempted which may derogate from the sovereignty of the mother-country. 3. Charter governments, in the nature of civil corporations, with the power of making by-laws for their own interior regulation, not contrary to the laws of England; and with such rights and authorities as are specially given them in their several charters of incorporation. The form of government in most of them is borrowed from that of England. They have a governor named by the king, (or in some proprietary colonies by the proprietor,) who is his representative or deputy.

[n] 7 Rep. 17. Calvin's case. Show. Parl. C. 31.

They have courts of justice of their own, from whose decisions an appeal lies to the king and council here in England. Their general assemblies which are their house of commons, together with their council of state being their upper house, with the concurrence of the king, or his representative the governor, make laws suited to their own emergencies. But it is particularly declared by statute 7 & 8 W. III. [109] c. 22. that all laws, by-laws, usages, and customs, which shall be in practice in any of the plantations, repugnant to any law, made or to be made in this kingdom relative to the said plantations, shall be utterly void and of none effect. And, because several of the colonies had claimed a sole and exclusive right of imposing taxes upon themselves, the statute 6 Geo. III. c. 12. expressly declares, that all his majesty's colonies and plantations in America have been, are, and of right ought to be, subordinate to and dependent upon the imperial crown and parliament of Great Britain; who have full power and authority to make laws and statutes of sufficient validity to bind the colonies and people of America, subjects of the crown of Great Britain, in all cases whatsoever. And this authority has been since very forcibly exemplified, and carried into act, by the statute 7 Geo. III. c. 59. for suspending the legislation of New-York; and by several subsequent statutes (17).

THESE are the several parts of the dominions of the crown of Great Britain, in which the municipal laws of England are

(17) By 22 Geo. III. c. 46. his majesty was empowered to conclude a truce or peace with the colonies or plantations in America, and by his letters patent to suspend or repeal any acts of parliament which related to those colonies. And by the first article of the definitive treaty of peace and friendship between his Britannic majesty and the United States of America, signed at Paris the 3d day of September 1783, his Britannic majesty acknowledges the United States of America to be free, sovereign and independent states. (*Ann. Regist.* 1783, *State Papers.*) And 23 Geo. III. c. 39. gives his majesty certain powers for the better carrying on trade and commerce between England and the United States.

not of force or authority, merely *as* the municipal laws of England. Most of them have probably copied the spirit of their own law from this original; but then it receives its obligation, and authoritative force, from being the law of the country.

As to any foreign dominions which may belong to the person of the king by hereditary descent, by purchase, or other acquisition, as the territory of Hanover, and his majesty's other property in Germany; as these do not in any wise appertain to the crown of these kingdoms, they are entirely unconnected with the laws of England, and do not communicate with this nation in any respect whatsoever. The English legislature had wisely remarked the inconveniences that had formerly resulted from dominions on the continent of Europe; from the Norman territory which William the conqueror brought with him, [110] and held in conjunction with the English throne; and from Anjou, and its appendages, which fell to Henry the second by hereditary descent. They had seen the nation engaged for near four hundred years together in ruinous wars for defence of these foreign dominions; till, happily for this country, they were lost under the reign of Henry the sixth. They observed that, from that time, the maritime interests of England were better understood and more closely pursued: that, in consequence of this attention, the nation, as soon as she had rested from her civil wars, began at this period to flourish all at once; and became much more considerable in Europe, than when her princes were possessed of a larger territory, and her councils distracted by foreign interests. This experience and these considerations gave birth to a conditional clause in the act[o] of settlement, which vested the crown in his present majesty's illustrious house, "that in case the crown and imperial dignity "of this realm shall hereafter come to any person not being "a native of this kingdom of England, this nation shall not

[o] Stat. 12 and 13 Will. III. c. 3.

"be obliged to engage in any war for the defence of any "dominions or territories which do not belong to the crown "of England, without consent of parliament."

We come now to consider the kingdom of England in particular, the direct and immediate subject of those laws, concerning which we are to treat in the ensuing commentaries. And this comprehends not only Wales and Berwick, of which enough has been already said, but also part of the sea. The main or high seas are part of the realm of England, for thereon our courts of admiralty have jurisdiction, as will be shewn hereafter; but they are not subject to the common law[p]. This main sea begins at the low-water-mark. But between the high-water-mark, and the low-water-mark, where the sea ebbs and flows, the common law and the admiralty have *divisum imperium*, an alternate jurisdiction; one upon the water, when it is full sea; the other upon the land, when it is an ebb[q].

The territory of England is liable to two divisions; the one ecclesiastical, the other civil.

[111] I. The ecclesiastical division is, primarily, into two provinces, those of Canterbury and York. A province is the circuit of an archbishop's jurisdiction. Each province contains divers dioceses, or sees of suffragan bishops; whereof Canterbury includes twenty-one, and York three: besides the bishoprick of the isle of Man, which was annexed to the province of York by king Henry VIII. Every diocese is divided into archdeaconries, whereof there are sixty in all; each archdeaconry into rural deaneries, which are the circuit of the archdeacon's and rural dean's jurisdiction, of whom hereafter; and every deanery is divided into parishes[r].

A parish is that circuit of ground which is committed to the charge of one parson, or vicar, or other minister having cure of souls therein. These districts are computed to be near ten thousand in number[s]. How ancient the divi-

p Co. Litt. 260.
q Finch. L. 78.
r Co. Litt. 94.
s Gibson's Britain.

sion of parishes is, may at present be difficult to ascertain; for it seems to be agreed on all hands, that in the early ages of christianity in this island, parishes were unknown, or at least signified the same that a diocese does now (18). There was then no appropriation of ecclesiastical dues to any particular church; but every man was at liberty to contribute his tithes to whatever priest or church he pleased, provided only that he did it to some; or, if he made no special appointment or appropriation thereof, they were paid into the hands of the bishop, whose duty it was to distribute them among the clergy, and for other pious purposes, according to his own discretion[t].

Mr. Camden[u] says, England was divided into parishes by archbishop Honorius about the year 630. Sir Henry Hobart[w] lays it down, that parishes were first erected [112] by the council of Lateran, which was held *A. D.* 1179. Each widely differing from the other, and both of them perhaps from the truth; which will probably be found in the medium between the two extremes. For Mr. Selden has clearly shewn[x], that the clergy lived in common without any division of parishes, long after the time mentioned by Camden. And it appears from the Saxon laws, that parishes were in being long before the date of that council of Lateran, to which they are ascribed by Hobart.

We find the distinction of parishes, nay even of mother-churches, so early as in the laws of king Edgar, about the year 970. Before that time the consecration of tithes was in general *arbitrary;* that is, every man paid his own (as was before observed) to what church or parish he pleased. But

t Seld. of tith. 9. 4. 2 Inst. 646. Hob. 296.
u In his Britannia.
w Hob. 296.
x Of tithes, c. 9.

(18) When the *dioichia,* or the district over which the bishop exercised his spiritual functions, was divided into lesser portions for the superintendance of his clergy, a word of similar import was adopted, *paroichia.* And in ancient times, Mr. Selden thinks, the words were used indiscriminately. Burn. Ec. L. 59.

this being liable to be attended with either fraud, or at least caprice, in the persons paying; and with either jealousies or mean compliances in such as were competitors for receiving them; it was now ordered by the law of King Edgar[y], that "*dentur omnes decimae primariae ecclesiae ad quam parochia pertinet.*" However, if any thane, or great lord, had a church, within his own demesnes, distinct from the mother-church, in the nature of a private chapel; then, provided such church had a cœmetery or consecrated place of burial belonging to it, he might allot one third of his tithes for the maintenance of the officiating minister: but, if it had no cœmetery, the thane must himself have maintained his chaplain by some other means; for in such case *all* his tithes were ordained to be paid to the *primariae ecclesiae* or mother-church[z].

THIS proves that the kingdom was then generally divided into parishes; which division happened probably not all at once, but by degrees. For it seems pretty clear and certain, that the boundaries of parishes were originally ascertained by those of a manor or manors: since it very seldom hap-
[113] pens that a manor extends itself over more parishes than one, though there are often many manors in one parish (19). The lords, as christianity spread itself, began to build churches upon their own demesnes or wastes, to accommodate their tenants in one or two adjoining lordships; and, in order to have divine service regularly performed therein, obliged all their tenants to appropriate their tithes to the maintenance of the one officiating minister, instead of leaving them at liberty to distribute them among the clergy of the diocese in general; and this tract of land, the tithes whereof were so appropriated, formed a distinct parish. Which will well enough account for the frequent intermixture of parishes

y Hob. c. 1.
z Ibid. c. 2. See also the laws of king Canute, c. 11. about the year 1030.

(19) But at present the boundaries of the one afford no evidence or inference whatever of the boundaries of the other.

one with another. For, if a lord had a parcel of land detached from the main of his estate, but not sufficient to form a parish of itself, it was natural for him to endow his newly erected church with the tithes of those disjointed lands; especially if no church was then built in any lordship adjoining to those outlying parcels.

THUS parishes were gradually formed, and parish churches endowed with the tithes that arose within the circuit assigned. But some lands, either because they were in the hands of irreligious and careless owners, or were situate in forests and desert places, or for other now unsearchable reasons, were never united to any parish, and therefore continue to this day extraparochial; and their tithes are now by immemorial custom payable to the king instead of the bishop, in trust and confidence that he will distribute them for the general good of the church[a]: yet extraparochial wastes and marsh-lands, when improved and drained, are by the statute 17 Geo. II. c. 37. to be assessed to all parochial rates in the parish next adjoining. And thus much for the ecclesiastical division of this kingdom.

2. THE civil division of the territory of England is [114] into counties, of those counties into hundreds, of those hundreds into tithings or towns. Which division, as it now stands, seems to owe its original to king Alfred: who, to prevent the rapines and disorders which formerly prevailed in the realm, instituted tithings; so called, from the Saxon, because *ten* freeholders with their families composed one. These all dwelt together, and were sureties or free pledges to the king for the good behaviour of each other; and if any offence was committed in their district, they were bound to have the offender forthcoming[b]. And therefore anciently no man was suffered to abide in England above forty days, unless he were

[a] 2 Inst. 647. 2 Rep. 44. Cro. Eliz. 512.

[b] Flet 1. 47. This the laws of king Edward the confessor, c. 20. very justly entitled, "summa et maxima securitas, per quam "omnes statu firmissimo sustinentur; quae "hoc modo fiebat, quod sub decennali fide- "jussione debebant esse universi, etc."

enrolled in some tithing or decennary [c]. One of the principal inhabitants of the tithing is annually appointed to preside over the rest, being called the tithing-man, the headborough, (words which speak their own etymology,) and in some countries the borsholder, or borough's-ealder, being supposed the discreetest man in the borough, town, or tithing [d].

TITHINGS, towns, or vills, (20), are of the same signification in law; and are said to have had, each of them, originally a church and celebration of divine service, sacraments, and burials [e]: though that seems to be rather an ecclesiastical, than a civil distinction. The word *town* or *vill* is indeed, by the alteration of times and language, now become a generical term, comprehending under it the several species of cities, boroughs, and common towns. A city is a town incorporated, which is or hath been the see of a bishop: and though the bishoprick be dissolved, as at Westminster (21),

[c] Mirr. c. 1. sec. 3. [d] Finch. L. 8. [e] 1 Inst. 115.

(20) In the 13 and 14 Car. II. c. 12., which provides, that when a parish is so large that it cannot have the benefit of the overseers and provision for the poor appointed by the 43 Eliz. c. 2., two overseers may be appointed for every township or village in such parish. In this statute the words *township* and *village* have always been thought synonimous But it has been held that wherever there is a constable, there is a township. (1 *T. R.* 376.) Parishes in some counties, as in part of Bedfordshire, are divided into tithings. (2 *Ludere*, 511).

(21) Westminster was one of the new bishopricks created by Henry VIII. out of the revenues of the dissolved monasteries. (2 *Burn. E. L.* 78.) Thomas Thirlby was the only bishop that ever filled that see: (*Godw. Com. de Præs.* 570.) he surrendered the bishoprick to Ed. VI. 30 March 1550, and on the same day it was dissolved and added again to the bishoprick of London. (*Rym. Foed.* 15 tom. p. 222.) Queen Mary afterwards filled the church with Benedictine monks, and Eliz. by authority of parliament, turned it into a collegiate church subject to a dean; but it retained the name of

yet still it remaineth a city[f]. A borough is now understood to be a town, either corporate or not, that sendeth burgesses to parliament[g]. Other towns there are, to the number sir Edward Coke says[h] of 8803, which are neither cities nor boroughs; some of which have the privileges of markets, and others not; but both are equally towns in law. To seve-

f Co. Litt. 109. g Litt. sec. 164. h 1 Inst. 116.

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city, not perhaps because it had been a bishop's see, but because, in the letters patent erecting it into a bishoprick, king Henry declared, *volumus itaque et per præsentes ordinamus quod ecclesia cathedralis et sedes episcopalis, ac quod tota villa nostra Westmonasterii sit civitas, ipsamque civitatem Westmonasterii vocari et nominari volumus et decernimus.* There was a similar clause in favour of the other five new created cities, viz. Chester, Peterborough, Oxford, Gloucester, and Bristol. The charter for Chester is in *Gibs. Cod.* 1449; and that for Oxford in *Rym. Foed.* 14 tom. 754. Lord Coke seems anxious to rank Cambridge among the cities, because he finds it called *civitas* in an ancient record, which he "thought it good to mention in remembrance of his love and duty, "*almæ matri academiæ Cantabrigiæ.*" (*Co. Litt.* 109.) The late learned Vinerian professor of Oxford has produced a decisive authority that cities and bishops' sees had not originally any necessary connection with each other. It is that of Ingulphus, who relates that at the great council assembled in 1072, to settle the claim of precedence between the two archbishops, it was decreed that bishops' sees should be transferred from towns to cities. (1 *Woodd.* 302.) In *Wil. Malm. Scrip. Ang.* p. 214. it is *concessum est episcopis de villis transire in civitates.*

The accidental coincidence of the same (or nearly the same) number of bishops and cities would naturally produce the supposition that they were connected together as a necessary cause and effect. It is certainly (as Mr. Wooddeson observes) a strong confirmation of this authority, that the same distinction is not paid to bishops' sees in Ireland. Mr. Hargrave in his notes to Co. Litt. 110. proves, that, although Westminster is a city, and has sent citizens to parliament since the time of Ed. VI. it never was incorporated; and this is a striking instance in contradiction to the learned opinions there referred to, viz. that the king could not grant within time of memory to any place the right of sending members to parliament without first creating that place a corporation.

ral of these towns there are small appendages belonging, called hamlets; which are taken notice of in the statute of Exeter[i], which makes frequent mention of entire vills, demi-vills, and hamlets. Entire vills sir Henry Spelman[k] conjectures to have consisted of ten freemen, or frank-pledges, demi-vills of five, and hamlets of less than five. These little collections of houses are sometimes under the same administration as the town itself, sometimes governed by separate officers; in which last case they are, to some purposes in law, looked upon as distinct townships. These towns, as was before hinted, contained each originally but one parish, and one tithing; though many of them now, by the increase of inhabitants, are divided into several parishes and tithings; and, sometimes, where there is but one parish there are two or more vills or tithings.

As ten families of freeholders made up a town or tithing, so ten tithings composed a superior division, called a hundred, as consisting of ten times ten families. The hundred is governed by an high constable or bailiff, and formerly there was regularly held in it the hundred court for the trial of causes, though now fallen into disuse. In some of the more northern counties these hundreds are called wapentakes[l] (22).

THE subdivision of hundreds into tithings seems to be most peculiarly the invention of Alfred: the institution of hundreds themselves he rather introduced than invented. For they seem to have obtained in Denmark[m]: and we find that

i 14 Edw. I.
k Gloss. 274.
l Seld. in Fortesc. c. 24.
m Seld. tit. of honour. 2. 5. 3.

(22) *Et quod Angli vocant hundredum, comitatus Yorkshire, Lincolnshire, Nottinghamshire, Leicestershire, et Northamptonshire, vocant wapentachium (Ll. Edw. c. 33).* And it proceeds to explain why they are called so, *viz.* because the people at a public meeting confirmed their union with the governor by touching his weapon or lance.

in France a regulation of this sort was made above two hundred years before; set on foot by Clotharius and Childebert, with a view of obliging each district to answer for the robberies committed in its own division. These divisions were, in that country, as well military as civil: and each contained a hundred freemen, who were subject to an officer called the *centenarius*; a number of which *centenarii* were themselves subject to a superior officer called the count [116] or *comes*[n]. And indeed something like this institution of hundreds may be traced back as far as the ancient Germans, from whom were derived both the Franks who became masters of Gaul, and the Saxons who settled in England: for both the thing and the name, as a territorial assemblage of persons, from which afterwards the territory itself might probably receive its denomination, were well known to that warlike people. "*Centeni ex singulis pagis sunt, idque ipsum inter suos vocantur; et quod primo numerus fuit, jam nomen et honor est*[o]."

An indefinite number of these hundreds make up a county or shire. Shire is a Saxon word signifying a division; but a county, *comitatus*, is plainly derived from *comes*, the count of the Franks; that is, the earl, or alderman, (as the Saxons called him) of the shire, to whom the government of it was intrusted. This he usually exercised by his deputy, still called in Latin *vice-comes*, and in English, the sheriff, shrieve, or shire-reeve, signifying the officer of the shire; upon whom by process of time the civil administration of it is now totally devolved. In some counties there is an intermediate division, between the shire and the hundreds, as lathes in Kent, and rapes in Sussex, each of them containing about three or four hundreds apiece. These had formerly their lathe-reeves and rape-reeves, acting in subordination to the shire-reeve. Where a county is divided into *three* of these intermediate jurisdictions, they are called trithings[p], which were an-

n Montesq. Sp. L. 30. 17. o Tacit. de morib. German. 6. p LL. Edw. c. 34.

ciently governed by a trithing-reeve. These trithings still subsist in the large county of York, where by an easy corruption they are denominated ridings; the north, the east, and the west-riding. The number of counties in England and Wales have been different at different times: at present they are forty in England, and twelve in Wales.

THREE of these counties, Chester, Durham, and Lancaster, are called counties palatine. The two former are such by prescription, or immemorial custom; or, at least as [117] old as the Norman conquest[q]: the latter was created by king Edward III. in favour of Henry Plantagenet, first earl and then duke of Lancaster[r]; whose heiress being married to John of Gant the king's son, the franchise was greatly enlarged and confirmed in parliament[s], to honour John of Gant himself, whom, on the death of his father-in-law, the king had also created duke of Lancaster[t]. Counties palatine are so called *a palatio*; because the owners thereof, the earl of Chester, the bishop of Durham, and the duke of Lancaster, had in those counties *jura regalia*, as fully as the king hath in his palace; *regalem potestatem in omnibus*, as Bracton expresses it[u]. They might pardon treasons, murders, and felonies; they appointed all judges and justices of the peace; all writs and indictments ran in their names, as in other counties in the king's; and all offences were said to be done against their peace, and not, as in other places, *contra pacem domini regis*[w]. And indeed by the ancient law, in all peculiar jurisdictions, offences were said to be done against his peace in whose court they were tried: in a court-leet, *contra pacem domini;* in the court of a corporation, *contra pacem ballivorum;* in the sheriff's court or tourn, *contra pacem vice-comitis*[x]. These palatine privileges (so similar to the regal independent jurisdictions usurped by the great barons on the continent,

q Seld. tit. hon. 2. 5. 8.

r Pat. 25 Edw. III. p. 1. m. 18. Seld. ibid. Sandford's gen. hist. 112. 4 Inst. 204.

s Cart. 36 Edw. III. n. 9.

t Pat. 51 Edw. III. m. 33. Plowd. 215. 7 Rym. 138.

u l. 3. c. 8. sec. 4.

w 4 Inst. 204.

x Seld. in Heng. magn. c. 2.

during the weak and infant state of the first feodal kingdoms in Europe[y]) were in all probability originally granted to the counties of Chester and Durham, because they bordered upon inimical countries, Wales and Scotland: in order that the inhabitants, having justice administered at home, might not be obliged to go out of the county, and leave it open to the enemy's incursions; and that the owners, being encouraged by so large an authority, might be the more watchful in its defence. And upon this account also there were formerly two other counties palatine, Pembrokeshire [118] and Hexhamshire; the latter now united with Northumberland: but these were abolished by parliament, the former in 27 Hen. VIII, the latter in 14 Eliz. And in 27 Hen. VIII, likewise, the powers before mentioned of owners of counties palatine were abridged; the reason for their continuance in a manner ceasing; though still all writs are witnessed in their names, and all forfeitures for treason by the common law accrue to them[z].

Of these three, the county of Durham is now the only one remaining in the hands of a subject. For the earldom of Chester, as Camden testifies, was united to the crown by Henry III; and has ever since given title to the king's eldest son. And the county palatine, or dutchy, of Lancaster, was the property of Henry Bolingbroke, the son of John of Gant, at the time when he wrested the crown from king Richard II, and assumed the title of king Henry IV. But he was too prudent to suffer this to be united to the crown; lest if he lost one, he should lose the other also. For, as Plowden[a] and sir Edward Coke[b] observe, "he knew he had the dutchy "of Lancaster by sure and indefeasible title, but that his title "to the crown was not so assured: for that after the de-"cease of Richard II, the right of the crown was in the heir "of Lionel duke of Clarence, *second* son of Edward III; "John of Gant, father to this Henry IV, being but the "*fourth* son." And therefore he procured an act of parlia-

y Robertson. Ch. V. i. 50.
z 4 Inst. 204.
a 215.
b 4 Inst. 205.

ment, in the first year of his reign, ordaining that the dutchy of Lancaster, and all other his hereditary estates, with all their royalties and franchises, should remain to him and his heirs for ever; and should remain, descend, be administered, and governed, in like manner as if he never had attained the regal dignity: and thus they descended to his son and grandson, Henry V and Henry VI; many new territories and privileges being annexed to the dutchy by the former[c]. Henry VI being attainted in 1 Edw. IV, this dutchy was declared in parliament to have become forfeited to the crown[d], [119] and at the same time an act was made to incorporate the dutchy of Lancaster, to continue the county palatine (which might otherwise have determined by the attainder[e]) and to make the same parcel of the dutchy: and, farther, to vest the whole in king Edward IV and his heirs, *kings of England*, for ever; but under a separate guiding and governance from the other inheritances of the crown. And in 1 Hen. VII another act was made, to resume such part of the dutchy lands as had been dismembered from it in the reign of Edward IV, and to vest the inheritance of the whole in the king and his heirs for ever, as amply and largely, and in like manner, form, and condition, separate from the crown of England and possession of the same, as the three Henries and Edward IV, or any of them, had and held the same[f].

c Parl. 2 Hen. V. n. 30. 3 Hen. V. n. 15.

d 3 Ventr. 155.

e 1 Ventr. 157.

f Some have entertained an opinion (Plowd. 220, 1, 2. Lamb. Archeion. 233. 4 Inst. 206.) that by this act the right of the dutchy vested only in the *natural*, and not in the *political* person of king Henry VII, as formerly in that of Henry IV; and was descendible to his natural heirs, independent of the succession to the crown. And, if this notion were well founded, it might have become a very curious question at the time of the revolution in 1688, in whom the right of the dutchy remained after king James's abdication, and previous to the attainder of the pretended prince of Wales. But it is observable, that in the same act the dutchy of Cornwall is also vested in king Henry VII and his heirs; which could never be intended in any event to be separated from the inheritance of the crown. And indeed it seems to have been understood very early after the statute of Henry VII, that the dutchy of Lancaster was by no means thereby made a separate inheritance from the rest of the royal patrimony; since it descended with the crown, to the half-blood in the instances of queen Mary and queen Elizabeth: which it could not have done, as the estate of a mere duke of Lancaster, in the common course of legal descent. The better opinion therefore seems to be that of those judges, who

THE isle of Ely is not a county palatine, though sometimes erroneously called so, but only a royal franchise: the bishop having, by grant of king Henry the first, *jura regalia* within the isle of Ely; whereby he exercises a jurisdiction over all causes, as well criminal as civil[s].

THERE are also counties *corporate:* which are cer- [120] tain cities and towns, some with more, some with less territory annexed to them; to which out of special grace and favour the kings of England have granted the privilege to be counties of themselves, and not to be comprised in any other county; but to be governed by their own sheriffs and other magistrates, so that no officers of the county at large have any power to intermeddle therein. Such are London, York, Bristol, Norwich, Coventry, and many others (23). And thus much of the countries subject to the laws of England.

held (Plowd. 221.) that notwithstanding the statute of Hen. VII. (which was only an act of resumption) the dutchy still remained as established by the act of Edward IV; separate from the other possessions of the crown in order and government, but united in point of inheritance.

[s] 4 Inst. 220.

(23) 3 Geo. I. c. 5. for the regulation of the office of sheriffs, enumerates twelve cities, and five towns, which are counties of themselves, and which have consequently their own sheriffs. The cities are, London, Chester, Bristol, Coventry, Canterbury, Exeter, Gloucester, Litchfield, Lincoln, Norwich, Worcester, York. The towns are Kingston-upon-Hull, Nottingham, Newcastle-upon-Tyne, Pool, Southampton.

COMMENTARIES

ON

The Laws of England.

BOOK THE FIRST.

OF THE RIGHTS OF PERSONS.

CHAPTER THE FIRST.

OF THE ABSOLUTE RIGHTS OF INDIVIDUALS.

THE objects of the laws of England are so very numerous and extensive, that, in order to consider them with any tolerable ease and perspicuity, it will be necessary to distribute them methodically, under proper and distinct heads; avoiding as much as possible divisions too large and comprehensive on the one hand, and too trifling and minute on the other; both of which are equally productive of confusion.

Now, as municipal law is a rule of civil conduct, commanding what is right, and prohibiting what is wrong; or as Cicero[a], and after him our Bracton[b], have expressed it, *sanctio justa, jubens honesta et prohibens contraria;* it follows, that the primary and principal objects of the law are RIGHTS and WRONGS. In the prosecution therefore of these commentaries, I shall follow this very simple and obvious division; and shall in the first place consider the *rights* that are commanded, and secondly the *wrongs* that are forbidden, by the laws of England.

RIGHTS are however liable to another subdivision: being either, first, those which concern and are annexed to the persons of men, and are then called *jura personarum* or the *rights of persons;* or they are, secondly, such as a man may acquire over external objects, or things unconnected with his person, which are styled *jura rerum* or the *rights of things*. Wrongs also are divisible into, first, *private wrongs*, which being an infringement merely of particular rights, concern individuals only, and are called civil injuries; and secondly, *public wrongs*, which, being a breach of general and public rights, affect the whole community, and are called crimes and misdemesnors.

THE objects of the laws of England falling into this fourfold division, the present commentaries will therefore consist of the four following parts: 1. *The rights of persons;* with the means whereby such rights may be either acquired or lost. 2. *The rights of things;* with the means also of acquiring and losing them. 3. *Private wrongs*, or civil injuries; with the means of redressing them by law. 4. *Public wrongs*, or crimes and misdemesnors; with the means of prevention and punishment (1).

a 11 Philipp. 12. b l. 1. c. 3.

(1) The distinction between *private wrongs* and *public wrongs* is more intelligible, and more accurately limited by the nature of the subjects, than the distinction between *the rights of things*, and *the rights of persons:* for all rights whatever must be the rights of

We are now, first, to consider the *rights of persons*; with the means of acquiring and losing them.

Now the rights of persons that are commanded to [123] be observed by the municipal law are of two sorts: first, such as are due *from* every citizen, which are usually called civil *duties*; and, secondly, such as belong *to* him, which is the more popular acceptation of *rights* or *jura*. Both may indeed be comprised in this latter division; for, as all social duties are of a relative nature, at the same time that they are due *from* one man, or set of men, they must also be due *to* another. But I apprehend it will be more clear and easy, to consider many of them as duties required from, rather than as rights belonging to, particular persons. Thus, for instance, allegiance is usually, and therefore most easily, considered as the duty of the people, and protection as the duty of the magistrate; and yet they are reciprocally, the rights as

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certain persons to certain things. Every right is annexed to a certain character or relation, which each individual bears in society. The rights of kings, lords, judges, husbands, fathers, heirs, purchasers, and occupants are all dependent upon the respective characters of the claimants. These rights might again be divided into rights to possess certain things, and the rights to do certain actions. This latter class of rights constitute powers and authority. But the distinction of *rights of persons* and *rights of things* in the first two volumes of the Commentaries, seems to have no other difference than the antithesis of the expression, and that too resting upon a solecism; for the expression, rights of things, or a right *of* a horse, is contrary to the idiom of the English language: we say, invariably, a right *to* a thing. The distinction intended by the learned Judge, in the first two volumes, appears, in a great degree, to be that of the rights of persons in public stations, and the rights of persons in private relations. But as the order of legal subjects is, in a great measure, arbitrary, and does not admit of that mathematical arrangement, where one proposition generates another, it perhaps would be difficult to discover any method more satisfactory, than that which the learned Judge has pursued, and which was first suggested by lord C. J. Hale. See *Hale's Analysis of the Law*.

well as duties of each other. Allegiance is the right of the magistrate, and protection the right of the people.

PERSONS also are divided by the law into either natural persons, or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.

THE rights of persons considered in their natural capacities are also of two sorts, absolute, and relative. Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons: relative, which are incident to them as members of society, and standing in various relations to each other. The first, that is, absolute rights, will be the subject of the present chapter.

BY the absolute *rights* of individuals we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it. But with regard to the absolute *duties*, which man is bound [124] to perform, considered as a mere individual, it is not to be expected that any human municipal law should at all explain or enforce them. For the end and intent of such laws being only to regulate the behaviour of mankind, as they are members of society, and stand in various relations to each other, they have consequently no concern with any other but social or relative duties. Let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. But if he makes his vices public, though they be such as seem principally to affect himself, (as drunkenness, or the like,) they then become, by the bad example they set, of pernicious effects to society; and therefore it is then the business of human laws to correct them. Here the circumstance of publication is what alters the nature of the case.

Public sobriety is a relative duty, and therefore enjoined by our laws; *private* sobriety is an obsolute duty, which, whether it be performed or not, human tribunals can never know; and therefore they can never enforce it by any civil sanction (2). But with respect to *rights*, the case is different. Human laws define and enforce as well those rights which belong to a man considered as an individual, as those which belong to him considered as related to others.

For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals. Such rights as are social and *relative* result from, and are posterior to, the formation of states and societies: so that to maintain and regulate these, is clearly a subsequent consideration. And therefore the principal view of human laws is, or ought always to be, to explain, protect, and enforce such rights as are absolute, which in themselves are few and simple; and then [125] such rights as are relative, which, arising from a variety of connexions, will be far more numerous and more complicated. These will take up a greater space in any code of laws, and hence may appear to be more attended to, though in reality they are not, than the rights of the former kind.

(2) This distinction seems to convey a doctrine that can hardly bear examination, or be reconciled with sound law and morality. The circumstance of publication as evidence of shameless profligacy and hardened depravity, may alter the nature of the punishment, but cannot alter the intrinsic criminality of the vicious act. Whatever is pernicious to society as an example, must necessarily be vicious and destructive in itself. What is ruinous and criminal to repeat and follow, must also be ruinous and criminal to commence. Human laws prohibit every where the guilty action, but punishment can only be the consequence of detection.

Let us therefore proceed to examine how far all laws ought, and how far the laws of England actually do, take notice of these absolute rights, and provide for their lasting security.

THE absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature; being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of free-will. But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it. For no man, that considers a moment, would wish to retain the absolute and uncontrolled power of doing whatever he pleases: the consequence of which is that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life. Political therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public[c]. Hence we may collect that the law, which restrains a man from [126] doing mischief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind; but that every wanton and causeless restraint of the will of the subject, whether practised by a monarch, a nobility, or a popular assembly, is a degree of tyranny: nay,

[c] Facultas ejus, quod cuique facere libet, nisi quid jure prohibetur. Inst. 1. 3. 1.

that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are regulations destructive of liberty: whereas, if any public advantage can arise from observing such precepts, the control of our private inclinations, in one or two particular points, will conduce to preserve our general freedom in others of more importance; by supporting that state of society, which alone can secure our independence. Thus the statute of king Edward IV[d], which forbad the fine gentlemen of those times (under the degree of a lord) to wear pikes upon their shoes or boots of more than two inches in length, was a law that savoured of oppression; because, however ridiculous the fashion then in use might appear, the restraining it by pecuniary penalties could serve no purpose of common utility. But the statute of king Charles II[e], which prescribes a thing seemingly as indifferent, (a dress for the dead, who are all ordered to be buried in woollen,) is a law consistent with public liberty; for it encourages the staple trade, on which in great measure depends the universal good of the nation. So that laws, when prudently framed, are by no means subversive but rather introductive of liberty; for (as Mr. Locke has well observed[f]) where there is no law there is no freedom. But then, on the other hand, that constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint (3).

d 3 Edw. IV. c. 5. e 30 Car. II. st. 1. c. 3. f on Gov. p. 2. sec. 57.

(3) This section is one of the very few intelligible descriptions of liberty, which have hitherto been communicated to the world. Though declamation and eloquence in all ages have exhausted their stores upon this favourite theme, yet reason has made so little progress in ascertaining the nature and boundaries of liberty, that there are very few

THE idea and practice of this political or civil liberty flourish in their highest vigour in these kingdoms, [127] where it falls little short of perfection, and can only

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authors indeed, either of this or of any other country, which can furnish the studious and serious reader with a clear and consistent account of this idol of mankind. Thousands worship it, and are even ready to offer their blood as a sacrifice to it, under the form of a tree, a cap, or a cockade. These foolish symbols, with various watch-words of sedition equally unmeaning, may inflame the passions of the vulgar for a time, when practised upon by all the artifices of designing and wicked men, and may suppress the voice of reason and sobriety, but the consequences are too terrible to last long. Anarchy must reform itself, or in a country where every crime is committed, and where neither life, person, nor property is secure, in such a war of all against all, each individual for his own sake will soon demand a truce, and offer articles of capitulation.

This subject deserves a discussion much more extensive than the limits of a note will admit, in which it would not be difficult to prove that Englishmen at present possess every species of liberty in a higher degree than ever was enjoyed in any other country, and even in a degree unknown to their ancestors. But I shall here briefly subjoin the different notions conveyed by the word *liberty*, which even by the most eminent writers and orators are generally confounded together.

The *libertas quidlibet faciendi*, or the liberty of doing every thing which a man's passions urge him to attempt, or his strength enables him to effect, is savage ferocity; it is the liberty of a tyger and not the liberty of a man.

"Moral or natural liberty (in the words of Burlamaqui, ch. 3. s. 15.) "is the right which nature gives to all mankind of disposing of their "persons and property after the manner they judge most consonant to "their happiness, on condition of their acting within the limits of the "law of nature, and that they do not any way abuse it to the prejudice "of any other men."

"This is frequently confounded, and even by the learned Judge in this very section, with savage liberty.

Civil liberty is well defined by our author to be "that of a mem-"ber of society, and is no other than *natural liberty* so far restrained by "human laws (and no farther) as is necessary and expedient for the general advantage of the public."

be lost or destroyed by the folly or demerits of its owner: the legislature, and of course the laws of England, being peculiarly adapted to the preservation of this inestimable blessing

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Mr. Paley begins his excellent chapter upon civil liberty with the following definition: "Civil liberty is the not being restrained by "any law, but what conduces in a greater degree to the public welfare." B. vi. c. 5.

The archbishop of York has defined "civil or legal liberty to be "that which consists in a freedom from all restraints except such as "established law imposes for the good of the community, to which the "partial good of each individual is obliged to give place." (A sermon preached Feb. 21. 1777, p. 19.)

All these three definitions of civil liberty are clear, distinct, and rational, and it is probable they were intended to convey exactly the same ideas; but I am inclined to think that the definition given by the learned Judge is the most perfect, as there are many restraints by natural law, which, though the established law does not enforce, yet it does not vacate and remove.

In the definition of civil liberty it ought to be understood, or rather expressed, that the restraints introduced by the law should be equal to all, or as much so as the nature of things will admit.

Political liberty may be defined to be the security with which, from the constitution, form, and nature of the established government, the subjects enjoy civil liberty. No ideas or definitions are more distinguishable than those of civil and political liberty; yet they are generally confounded; and the latter cannot yet claim an appropriate name. The learned Judge uses political and civil liberty indiscriminately; but it would perhaps be convenient uniformly to use those terms in the respective senses here suggested, or to have some fixed specific denominations of ideas, which in their nature are so widely different. The last species of liberty has probably more than the rest engaged the attention of mankind, and particularly the people of England. Civil liberty, which is nothing more than the impartial administration of equal and expedient laws, they have long enjoyed nearly to as great an extent as can be expected under any human establishment.

But some who are zealous to perpetuate these inestimable blessings of civil liberty, fancy that our political liberty may be augmented by reforms, or what they deem improvements in the constitution

even in the meanest subject. Very different from the modern constitutions of other states, on the continent of Europe, and from the genius of the imperial law; which in general are

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of the government. Men of such opinions and dispositions there will be, and perhaps it is to be wished that there should be, in all times. But before any serious experiment is made, we ought to be convinced by little less than mathematical demonstration, that we shall not sacrifice substance to form, the end to the means, or exchange present possession for future prospects. It is true, that civil liberty may exist in perfection under an absolute monarch, according to the well-known verse:

Fallitur egregio quisquis sub principe credit
Servitium. Nunquam libertas gratior extat
Quam sub rege pio. CLAUD.

But what security can the subjects have for the virtues of his successor? Civil liberty can only be secure where the king has no power to do wrong, yet all the prerogatives to do good. Under such a king, with two houses of parliament, the people of England have a firm reliance that they will retain and transmit the blessings of civil and political liberty to the latest posterity.

There is another common notion of liberty, which is nothing more than a freedom from confinement. This is a part of civil liberty, but it being the most important part, as a man in a gaol can have the exercise and enjoyment of few rights, it is κατ' ἐξοχην called *liberty*.

But where imprisonment is necessary for the ends of public justice, or the safety of the community, it is perfectly consistent with civil liberty. For Mr. Paley has well observed, that "it is not the rigour, "but the inexpediency of laws and acts of authority, which makes "them tyrannical." (B. vi. c. 5.)

This is agreeable to that notion of civil liberty entertained by Tacitus, one who was well acquainted with the principles of human nature and human governments, when he says, *Gothones regnantur paulò jam adductius, quam cæteræ Germanorum gentes, nondum tamen supra libertatem.* De Mor. Germ. c. 43.

It is very surprising that the learned Commentator should cite with approbation (p. 6. and 125.) and that Montesquieu should adopt (b. xi. c. 13.) that absurd definition of liberty given in Justinian's Institutes: *Facultas ejus, quod cuique facere libet, nisi quid*

calculated to vest an arbitrary and despotic power, of controlling the actions of the subject, in the prince, or in a few grandees. And this spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or a negro, the moment he lands in England, falls under

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vi, aut jure prohibetur. In every country, and under all circumstances, the subjects possess the liberty described by this definition.

When an innocent negro is seized and chained, or is driven to his daily toil by a merciless master, he still retains this species of liberty, or that little power of action, of which force and barbarous laws have not bereft him. But we must not have recourse to a system of laws, in which it is a fundamental principle, *quod principi placuit, legis habet vigorem*, for correct notions of liberty.

So far the Editor thought it proper to suggest to the student the different significations of the word *liberty;* a word which it is of the utmost importance to mankind that they should clearly comprehend: for though a genuine spirit of liberty is the noblest principle that can animate the heart of man, yet liberty, in all times, has been the clamour of men of profligate lives and desperate fortunes: *Falsò libertatis vocabulum obtendi ab iis, qui privatim degeneres, in publicum exitiosi, nihil spei, nisi per discordias habeant;* (Tac. 11 Ann. c. 17.) The first sentence of Hooker's Ecclesiastical Polity contains no less truth and eloquence: "He "that goeth about to persuade a multitude, that they are not so "well governed as they ought to be, shall never want attentive "and favourable hearers."

This subject might be elucidated by various instances, particularly from the laws and constitution of this country; and the Editor cannot but cherish even a confident hope, that they who acquire the most intimate acquaintance with those laws and that constitution, will always be the most convinced, that to be free, is to live in a country where the laws are just, expedient, and impartially administered, and where the subjects have perfect security that they will ever continue so; and, allowing for some slight and perhaps inevitable imperfections, that to be free, is to be born and to live under the English constitution. *Hanc retinete, quæso, Quirites, quam vobis tanquam hæreditatem, majores vestri reliquerunt* Cic. 4 Phil.

the protection of the laws, and so far becomes a freeman[g]; though the master's right to his service may *possibly* still continue (4).

THE absolute rights of every Englishman, (which, taken in a political and extensive sense, are usually called their liberties,) as they are founded on nature and reason, so they are coeval with our form of government; though subject at times to fluctuate and change: their establishment (excellent as it is) being still human. At some times we have seen them depressed by overbearing and tyrannical princes; at others so luxuriant as even to tend to anarchy, a worse state than tyranny itself, as any government is better than none at all (5). But the vigour of our free constitution has always delivered the nation from these embarrassments: and, as soon as the convulsions consequent on the struggle have been over, the balance of our rights and liberties has settled to its proper level; and their fundamental articles have been from time to time asserted in parliament, as often as they were thought to be in danger.

g Salk. 666. See ch. 14.

(4) It is not to the soil or to the air of England that negroes are indebted for their liberty, but to the efficacy of the writ of *habeas corpus*, which can only be executed by the sheriff in an English county. I do not see how the master's right to the service can possibly continue; it can only arise from a contract, which the negro in a state of slavery is incapable of entering into with his master. See page 425.

(5) Lord Camden concluded his judgment in the case of general warrants in the same words: "One word more for ourselves; we are "no advocates for libels; all governments must set their faces against "them, and whenever they come before us and a jury, we shall set "our faces against them; and if juries do not prevent them, they may "prove fatal to liberty, destroy government, and introduce anarchy; "but tyranny is better than anarchy, and the worst government better "than none at all." 2 *Wils.* 292.

FIRST, by the great charter of liberties, which was obtained, sword in hand, from king John, and afterwards, with some alterations, confirmed in parliament by king Henry the third, his son. Which charter contained very few new grants; but, as sir Edward Coke[h] observes, was for the most part declaratory of the principal grounds of the [128] fundamental laws of England (6). Afterwards by the statute called *confirmatio cartarum*[i] whereby the great charter is directed to be allowed as the common law; all judgments contrary to it are declared void; copies of it are ordered to be sent to all cathedral churches, and read twice a year to the people; and sentence of excommunication is directed to be as constantly denounced against all those that by word, deed, or counsel, act contrary thereto, or in any degree infringe it. Next, by a multitude of subsequent corroborating statutes, sir Edward Coke, I think, reckons thirty-two[k],) from the first Edward to Henry the fourth. Then, after a long interval, by *the petition of right*; which was a parliamentary declaration of the liberties of the people, assented to by king Charles the first in the beginning of his reign. Which was closely followed by the still more ample concessions made by that unhappy prince to his parliament, before the fatal rupture between them; and by the many salutary laws, particularly the *habeas corpus* act, passed under Charles the second. To these succeeded *the bill of rights*, or declaration delivered by the lords and commons to the prince and princess of Orange 13 February 1688; and afterwards enacted in parliament when they became king and queen: which declaration concludes in these remarkable words; "and they "do claim, demand, and insist upon, all and singular the "premises, as their undoubted rights and liberties." And the act of parliament itself[l] recognises "all and singular the

h 2 Inst. proem.
i 25 Edw. I.
k 2 Inst. proem.
l 1 W. and M. st. 2. c. 2.

(6) See a fuller account of Magna Charta, 4 vol. p. 424.

"rights and liberties asserted and claimed in the said declara-
"tion to be the true, ancient, and indubitable rights of the
"people of this kingdom." Lastly, these liberties were again asserted at the commencement of the present century, in the *act of settlement* [m], whereby the crown was limited to his present majesty's illustrious house: and some new provisions were added, at the same fortunate æra, for better securing our religion, laws, and liberties; which the statute declares to be "the birthright of the people of England," according to the ancient doctrine of the common law [n].

[129] THUS much for the *declaration* of our rights and liberties. The rights themselves, thus defined by these several statutes, consist in a number of private immunities; which will appear, from what has been premised, to be indeed no other, than either that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals. These therefore were formerly, either by inheritance or purchase, the rights of all mankind; but, in most other countries of the world being now more or less debased and destroyed, they at present may be said to remain, in a peculiar and emphatical manner, the rights of the people of England. And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property: because, as there is no other known method of compulsion, or of abridging man's natural free-will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.

I. THE right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

m 12 and 13 W. III. c. 2. n Plowd. 55.

1. LIFE is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and, by a potion or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder (7), was by the ancient law homicide or manslaughter[o]. But the modern law doth not look upon this offence in quite so atrocious [130] a light (8), but merely as a heinous misdemesnor[p].

AN infant *in ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it[q]; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born[r] (9). And in this point the civil law agrees with ours[s].

o Si aliquis mulierem pregnantem percusserit, vel ei venenum dederit, per quod fecerit abortivam; si puerperium jam formatum fuerit, et maxime si fuerit animatum, facit homicidium. Bracton. l. 3. c. 21.

p 3 Inst. 50.

q Stat. 12 Car. II. c. 24.

r Stat. 10 and 11 W. III. c. 16.

s Qui in utero sunt, in jure civili intelliguntur in rerum natura esse, cum de eorum commodo agatur. Ff. 1. 5. 26.

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(7) The distinction between murder and manslaughter or felonious homicide, in the time of Bracton, was in a great degree nominal. The punishment of both was the same; for murder as well as manslaughter, by the common law, had the benefit of clergy. *Fost.* 302.

(8) But if the child be born alive, and afterwards die in consequence of the potion or beating, it will be murder (3 *Inst.* 50. 1 *P. Wms.* 245.); and of course those who, with a wicked intent, administered the potion, or advised the woman to take it, will be accessaries before the fact, and subject to the same punishment as the principal.

(9) It may have a distributive share of intestate property even with the half blood (1 *Ves.* 81.): it is capable of taking a devise of land (2 *Atk.* 117. 1 *Freem.* 244. 298.): it takes under a marriage settlement, a provision made for children living at the death of the father. (1. *Ves.* 85.) And it has lately been decided, that marriage, and the birth of a posthumous child, amount to a revocation of a will executed previous to

2. A MAN'S limbs (by which for the present we only understand those members which may be useful to him in fight, and the loss of which alone amounts to mayhem by the common law) are also the gift of the wise creator, to enable him to protect himself from external injuries in a state of nature. To these therefore he has a natural inherent right; and they cannot be wantonly destroyed or disabled without a manifest breach of civil liberty.

BOTH the life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed *se defendendo*, or in order to preserve them. For whatever is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion. Therefore if a man through fear of death or mayhem is prevailed upon to execute a deed, or do any other legal act; these, though accompanied with all other the requisite solemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of his non-compliance[t]. And the same is also a sufficient excuse for the commission of many misdemesnors, as will appear in the fourth book. The constraint a man is under in these circumstances is called in law *duress*, from the Latin *duritia*, of which there are
[131] two sorts; duress of imprisonment, where a man actually loses his liberty, of which we shall presently speak; and duress *per minas*, where the hardship is only threatened and impending, which is that we are now discoursing of. Duress *per minas* is either for fear of loss of life, or else for fear of mayhem, or loss of limb. And this fear

[t] 2 Inst. 483.

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the marriage. (5 *T. R.* 49.) So in executory devises it is considered as a life in being. (7 *T. R.* 100.) See 2 vol. 174. n. 4. It takes land by descent, though, in that case, the presumptive heir may enter and receive the profits for his own use till the birth of the child (3 *Wils.* 526.), which seems to be the only interest it loses by its situation. See also 2 vol. 169.

must be upon sufficient reason; "*non*," as Bracton expresses it, "*suspicio cujuslibet vani et meticulosi hominis, sed talis qui "possit cadere in virum constantem; talis enim debet esse "metus, qui in se contineat vitae periculum, aut corporis cru-"ciatum*[u]." A fear of battery, or being beaten, though never so well grounded, is no duress; neither is the fear of having one's house burned, or one's goods taken away and destroyed; because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages[w]: but no suitable atonement can be made for the loss of life, or limb (10). And the indulgence shewn to a man under this, the principal, sort of duress, the fear of losing his life or limbs, agrees also with that maxim of the civil law; *ignoscitur ei qui sanguinem suum qualiter qualiter redemptum voluit*[x].

THE law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with every thing necessary for their support. For there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessities of life from the more opulent part of the community, by means of the several statutes enacted for the relief of the poor, of which in their proper places. A humane provision; yet, though dictated by the principles of society, discountenanced by the Roman laws. For the edicts of the emperor Constantine commanding the public to maintain the children of those who were unable to provide for them, in order to prevent the murder and exposure of infants, an institution founded on the same principle as our foundling hospitals, though comprised in the Theodosian code[y], were rejected in Justinian's collection.

THESE rights, of life and member, can only be [132] determined by the death of the person; which was formerly accounted to be either a civil or natural death. The civil death commenced, if any man was banished or abjured the

u l. 2. c. 5.
w 2 Inst. 483.
x Ff. 48. 21. 1.
y l. 11. c. 27.

(10) See 4 vol. 30.

realm[z] by the process of the common law, or entered into religion; that is, went into a monastery, and became there a monk professed: in which cases he was absolutely dead in law, and his next heir should have his estate. For such banished man was entirely cut off from society; and such a monk, upon his profession, renounced solemnly all secular concerns: and besides, as the popish clergy claimed an exemption from the duties of civil life and the commands of the temporal magistrate, the genius of the English laws would not suffer those persons to enjoy the benefits of society, who secluded themselves from it, and refused to submit to its regulations[a]. A monk was therefore accounted *civiliter mortuus*, and when he entered into religion might, like other dying men, make his testament and executors; or, if he made none, the ordinary might grant administration to his next of kin, as if he were actually dead intestate. And such executors and administrators had the same power, and might bring the same actions for debts due *to* the religious, and were liable to the same actions for those due *from* him, as if he were naturally deceased[b]. Nay so far has this principle been carried, that when one was bound in a bond to an abbot and his successors, and afterwards made his executors and professed himself a monk of the same abbey, and in process of time was himself made abbot thereof; here the law gave him, in the capacity of abbot, an action of debt against his own executors to recover the money due[c]. In short, a monk or religious was so effectually dead in law, that a lease made even to a third person, during the life (generally) of one who afterwards became a monk, determined by such his entry into religion: for which reason leases and other conveyances for life, were usually made to have and to hold for the term of one's *natural* life[d]. But, even in the times of popery, the [123] law of England took no cognisance of *profession* in any foreign country, because the fact could not

z Co. Litt. 133.

a This was also a rule in the feodal law 2. t. 21. destit esse miles seculi, qui factus est miles Christi; nec beneficium pertinet ad eum qui non debet gerere officium.

b Litt. sec. 200.

c Co. Litt. 133.

d 2 Rep. 48. Co. Litt. 132.

be tried in our courts[e], and therefore, since the reformation, this disability is held to be abolished[f]: as is also the disability of banishment, consequent upon abjuration, by statute 21 Jac. I. c. 28. (11).

THIS natural life being, as was before observed, the immediate donation of the great creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow-creatures, merely upon their own authority. Yet nevertheless it may, by the divine permission, be frequently forfeited for the breach of those laws of society, which are enforced by the sanction of capital punishments; of the nature, restrictions, expedience, and legality of which, we may hereafter more conveniently inquire in the concluding book of these commentaries. At present, I shall only observe, that whenever the *constitution* of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subject, such constitution is in the highest degree tyrannical: and that whenever any *laws* direct such destruction for light and trivial causes, such laws are likewise tyrannical, though in an inferior degree: because here the subject is aware of the danger he is exposed to, and may by prudent caution provide against it. The statute law of England does therefore very seldom, and the common law does never inflict any punishment extending to life or limb, unless upon the

e Co. Litt. 132. f 1 Salk. 162.

(11) One species of civil death may still exist in this country; that is, where a man by act of parliament is attainted of treason or felony, and saving his life, is banished for ever; this lord Coke declares to be a civil death. But he says, a temporary exile is not a civil death. *Co. Litt.* 133. And for the same reason where a man receives judgment of death, and afterwards leaves the kingdom for life, upon a conditional pardon, this seems to amount to a civil death: this practice did not exist in the time of lord Coke, who says, that a man can only lose his country by authority of parliament. *Ib.*

highest necessity (12): and the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law. "*Nullus liber homo*," says the great charter[g], "*aliquo modo destruatur, nisi per legale judi-*
"*cium parium suorum aut per legem terrae.*" Which words, "*aliquo modo destruatur*," according to sir Edward Coke[h], include a prohibition not only of *killing*, and *maiming*, but also of *torturing*, (to which our laws are strangers), and of every oppression by colour of an illegal authority. And it is enacted by the statute 5 Edw. III. c. 9. that no man [134] shall be forejudged of life or limb, contrary to the great charter and the law of the land: and again, by statute 28 Edw. III. c. 3. that no man shall be put to death, without being brought to answer by due process of law.

3. Besides those limbs and members that may be necessary to a man, in order to defend himself or annoy his enemy, the rest of his person or body is also entitled, by the same natural right, to security from the corporal insults of menaces, assaults, beating, and wounding; though such insults amount not to destruction of life or member.

4. The preservation of a man's health from such practices as may prejudice or annoy it; and

5. The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is entitled, by reason and natural justice; since without these it is impossible to have the perfect enjoyment of any other advantage or right. But these three last articles (being of much less importance than those which have gone before, and those which are yet to come) it will suffice to have barely mentioned among the rights of persons: referring the more minute dis-

g c. 29. h 2 Inst. 48.

(12) This is a compliment which, I fear, the common law does not deserve; for although it did not punish with death any person who could read, even for any number of murders or other felonies, yet it inflicted death upon every felon who could not read, though his crime was the stealing only of twelve-pence farthing.

cussion of their several branches, to those parts of our commentaries which treat of the infringement of these rights, under the head of personal wrongs.

II. NEXT to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observations as upon the preceding article; that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause; and, that in this kingdom it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. Here again the language of the great charter[i] is, that no freeman shall be taken or [135] imprisoned, but by the lawful judgment of his equals, or by the law of the land. And many subsequent old statutes[j] expressly direct, that no man shall be taken or imprisoned by suggestion or petition to the king or his council, unless it be by legal indictment, or the process of the common law. By the petition of right, 3 Car. I. it is enacted, that no freeman shall be imprisoned or detained without cause shewn, to which he may make answer according to law. By 16 Car. I. c. 10. if any person be restrained of his liberty by order or decree of any illegal court, or by command of the king's majesty in person, or by warrant of the council board, or of any of the privy council; he shall, upon demand of his council, have a writ of *habeas corpus*, to bring his body before the court of king's bench or common pleas; who shall determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by 31 Car. II. c. 2. commonly called the *habeas corpus act*, the methods of obtaining this writ are so plainly pointed out and enforced, that, so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those

i c. 29. j 5 Edw. III. c. 9. 25 Edw. III. st. 5. c. 4. 28 Edw. III. c. 3.

cases in which the law requires and justifies such detainer. And, lest this act should be evaded by demanding unreasonable bail, or sureties for the prisoner's appearance, it is declared by 1 W. & M. st. 2. c. 2. that excessive bail ought not to be required.

Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper, (as in France it is daily practised by the crown[k],) there would soon be an end of all other rights and immunities. Some have thought, that unjust attacks, even upon life, or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth, than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom: but confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great, as to render this measure expedient: for it is the parliament only, or legislative power, that, whenever it sees proper, can authorise the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reason for so doing; as the senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger. The decree of the senate, which usually preceded the nomination of this magistrate, "*dent operam consules, ne quid respublica*

[136]

k I have been assured upon good authority, that, during the mild administration of cardinal Fleury, above 54000 *lettres de cachet* were issued, upon the single ground of the famous bulle *unigenitus*.

"*detrimenti capiat*," was called the *senatus consultum ultimae necessitatis*. In like manner this experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with its liberty for a while, in order to preserve it for ever.

THE confinement of the person, in any wise, is an imprisonment. So that the keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment[l]. And the law so much discourages unlawful confinement, that if a man is under *duress of imprisonment*, which we before explained to mean a compulsion by an illegal restraint of liberty, until he seals a bond or the like; he may allege this duress, and avoid the extorted bond. But if a man be lawfully imprisoned, and either to procure his discharge, or on any other fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it[m]. To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into (if necessary) upon a *habeas corpus*. If there be no cause expressed, the gaoler is not bound to detain the prisoner[n]. For the law judges in this respect, saith Sir Edward Coke, like Festus the Roman governor; that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him. [137]

A NATURAL and regular consequence of this personal liberty is, that every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law. The king indeed, by his royal prerogative, may issue out his writ *ne exeat regnum* (13), and prohibit any of his subjects from going

l 2 Inst. 589. m 2 Inst. 482. n Ibid. 52, 53.

(13) See p. 266.

into foreign parts without license[o]. This may be necessary for the public service and safeguard of the commonwealth. But no power on earth, except the authority of parliament, can send any subject of England *out of* the land against his will; no, not even a criminal. For exile, and transportation, are punishments at present unknown to the common law; and, whenever the latter is now inflicted, it is either by the choice of the criminal himself to escape a capital punishment, or else by the express direction of some modern act of parliament (14). To this purpose the great charter[p] declares, that no freeman shall be banished, unless by the judgment of his peers, or by the law of the land. And by the *habeas corpus* act, 31 Car. II. c. 2. (that second *magna carta*, and stable bulwark of our liberties) it is enacted, that no subject of this realm, who is an inhabitant of England, Wales, or Berwick, shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, [138] or places beyond the seas; (where they cannot have the full benefit and protection of the common law;) but

o F. N. B. 85. p c. 29.

(14) It is said that exile was first introduced as a punishment by the legislature in the 39th year of Eliz. when a statute enacted that "such rogues as were dangerous to the inferior people should be "banished the realm;" (39 *Eliz. c.* 4. See *Barr. Ant. Stat.* 269.) and that the first statute in which the word transportation is used is the 18 C. II. c. 3. which gives a power to the judges at their discretion either to execute or transport to America for life, the Moss-troopers of Cumberland and Northumberland, (2 *Woodd.* 498.) a law which very unnecessarily was continued till the 31 Geo. II. c. 42. and then made perpetual. This perhaps is the only instance in which the legislature has extended the term of transportation beyond fourteen years. But to persons capitally convicted the king frequently offers a pardon upon condition of their being transported for life. Many have at first rejected this gracious offer, and there have been one or two instances of persons so desperate as to persist in the refusal, and who in consequence suffered the execution of their sentence. Where a pardon is granted upon condition of transportation, and no term is specified, in that case the offender shall be transported for 14 years. 4 Geo. I. c. 11.

that all such imprisonments shall be illegal; that the person, who shall dare to commit another contrary to this law, shall be disabled from bearing any office, shall incur the penalty of a *praemunire*, and be incapable of receiving the king's pardon: and the party suffering shall also have his private action against the person committing, and all his aiders, advisers, and abettors, and shall recover treble costs; besides his damages, which no jury shall assess at less than five hundred pounds.

THE law is in this respect so benignly and liberally construed for the benefit of the subject, that, though *within* the realm the king may command the attendance and service of all his liegemen, yet he cannot send any man *out of* the realm, even upon the public service; excepting sailors and soldiers, the nature of whose employment necessarily implies an exception: he cannot even constitute a man lord deputy or lieutenant of Ireland against his will, nor make him a foreign ambassador[q]. For this might in reality be no more than an honourable exile.

III. THE third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. The original of private property is probably founded in nature, as will be more fully explained in the second book of the ensuing commentaries: but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty. The laws of England are therefore, in point of honour and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the great charter[r] has declared that no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free customs, but by the judgment of his peers, or by the

[q] 2 Inst. 46. [r] c. 29.

law of the land. And by a variety of ancient statutes[s] it is enacted, that no man's lands or goods shall be seised into the king's hands, against the great charter and the law of the land; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if any thing be done to the contrary, it shall be redressed, and holden for none.

So great moreover is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does, is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform (15).

[s] 5 Edw. III. c. 9. 25 Edw. III. st. 5. c. 4. 28 Edw. III. c. 3.

(15) But by the last highway act (13 Geo. III. c. 78.) two justices may either widen or divert any highway through or over any person's

Nor is this the only instance in which the law of the land has postponed even public necessity to the sacred and inviolable rights of private property. For no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament. By the statute 25 Edw. I. c. 5. and 6. it is provided, that the king shall not take any aids or tasks, but by the common assent of the realm. And what that common assent is, is more fully explained by 34 Edw. I. st. 4. c. 1. which[t] enacts, that no talliage or aid shall be taken without the assent of the archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the land: and again, by 14 Edw. III. st. 2. c. 1. the prelates, earls, barons, and commons, citizens, burgesses, and merchants shall not be charged to make any aid, if it be not by the common assent of the great men and commons in parliament. And as this fundamental law had been shamefully evaded under many

t See the introduction to the great charter (edit. Oxon.) sub anno 1297; wherein it is shewn that this statute de talliagio non concedendo, supposed to have been made in 34 Edw. I, is in reality nothing more than a sort of translation into Latin of the confirmatio cartarum, 25 Edw. I, which was originally published in the Norman language.

soil, even without his consent, so that the new way shall not be more than thirty feet wide, and that they pull down no building, nor take away the ground of any garden, park, or yard. But the surveyor shall offer the owner of the soil, over which the new way is carried, a reasonable compensation, which if he refuses to accept, the justices shall certify their proceedings to some general quarter sessions, and the surveyor shall give fourteen days notice to the owner of the soil of an intention to apply to the sessions; and the justices of the sessions shall empannel a jury, who shall assess the damages, which the owner of the soil has sustained, provided that they do not amount to more than forty years purchase. And the owner of the soil shall still be entitled to all the mines within the soil, which can be got without breaking the surface of the highway.

succeeding princes, by compulsive loans, and benevolences extorted without a real and voluntary consent, it was made an article in the petition of right 3 Car. I, that no man shall be compelled to yield any gift, loan, or benevolence, tax, or such like charge, without common consent by act of parliament. And, lastly, by the statute 1 W. and M. st. 2. c. 2. it is declared, that levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament; or for longer time, or in other manner, than the same is or shall be granted; is illegal.

In the three preceding articles we have taken a short view of the principal absolute rights which appertain to every Englishman. But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, [141] if the constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers, to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property. These are,

1. The constitution, powers, and privileges of parliament, of which I shall treat at large in the ensuing chapter.

2. The limitation of the king's prerogative, by bounds, so certain and notorious, that it is impossible he should either mistake or legally exceed them without the consent of the people. Of this also I shall treat in its proper place. The former of these keeps the legislative power in due health and vigour, so as to make it improbable that laws should be enacted destructive of general liberty: the latter is a guard upon the executive power, by restraining it from acting either beyond or in contradiction to the laws, that are framed and established by the other.

3. A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries.

Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein. The emphatical words of *magna carta*[u], spoken in the person of the king, who in judgment of law (says sir Edward Coke[w]) is ever present and repeating them in all his courts, are these; *nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam:* "and therefore every "subject," continues the same learned author, "for injury "done to him *in bonis, in terris, vel persona*, by any other "subject, be he ecclesiastical or temporal, without any "exception, may take his remedy by the course of the law, "and have justice and right for the injury done to him, "freely without sale, fully without any denial, and speedily "without delay." It were endless to enumerate all the *affirmative* acts of parliament, wherein justice is directed to be done according to the law of the land; [142] and what that law is, every subject knows, or may know, if he pleases; for it depends not upon the arbitrary will of any judge, but is permanent, fixed, and unchangeable, unless by authority of parliament. I shall however just mention a few *negative* statutes, whereby abuses, perversions, or delays of justice, especially by the prerogative, are restrained. It is ordained by *magna carta*[x], that no freeman shall be outlawed, that is, put out of the protection and benefit of the laws, but according to the law of the land. By 2 Edw. III. c. 8. and 11 Ric. II. c. 10. it is enacted, that no commands or letters shall be sent under the great seal, or the little seal, the signet, or privy seal, in disturbance of the law; or to disturb or delay common right: and, though such commandments should come, the judges shall not cease to do right; which is also made a part of their oath by statute 18 Edw. III. st. 4. And by 1 W. & M. st. 2. c. 2. it is declared, that the pretended power of suspending, or dispensing with laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.

u c. 29. w 2 Inst. 55. x c. 29.

Not only the substantial part, or judicial decisions, of the law, but also the formal part, or method of proceeding, cannot be altered but by parliament: for, if once those outworks were demolished, there would be an inlet to all manner of innovation in the body of the law itself. The king, it is true, may erect new courts of justice; but then they must proceed according to the old established forms of the common law. For which reason it is declared in the statute 16 Car. I. c. 10. upon the dissolution of the court of starchamber, that neither his majesty, nor his privy council, have any jurisdiction, power, or authority by English bill, petition, articles, libel, (which were the course of proceeding in the starchamber, borrowed from the civil law,) or by any other arbitrary way whatsoever, to examine, or draw into question, determine, or dispose of the lands or goods of any subjects of this kingdom; but that the same ought to be tried and determined in the ordinary courts of justice, and by *course of law*.

[143] 4. If there should happen any uncommon injury, or infringement of the rights before-mentioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right, appertaining to every individual, namely, the right of petitioning the king, or either house of parliament, for the redress of grievances. In Russia we are told[y] that the czar Peter established a law, that no subject might petition the throne, till he had first petitioned two different ministers of state. In case he obtained justice from neither, he might then present a third petition to the prince; but upon pain of death, if found to be in the wrong. The consequence of which was, that no one dared to offer such third petition; and grievances seldom falling under the notice of the sovereign, he had little opportunity to redress them. The restrictions, for some there are, which are laid upon petitioning in England, are of a nature extremely different; and while they promote the spirit of peace, they are no check upon that of liberty. Care only must be taken, lest, under the pretence of petitioning, the subject be guilty of any

y Montesq. Sp. L. xii. 26.

riot or tumult; as happened in the opening of the memorable parliament in 1640: and, to prevent this, it is provided by the statute 13 Car. II. st. 1. c. 5. that no petition to the king, or either house of parliament, for any alteration in church or state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace, or the major part of the grand jury (16), in the country; and in London by the lord mayor, aldermen, and common council: nor shall any petition be presented by more than ten persons at a time. But, under these regulations, it is declared by the statute 1 W. & M. st. 2. c. 2. that the subject hath a right to petition; and that all commitments and prosecutions for such petitioning are illegal.

5. The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared [144] by the same statute 1 W. & M. st. 2. c. 2. and it is indeed a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.

In these several articles consist the rights, or, as they are frequently termed, the liberties of Englishmen: liberties, more generally talked of than thoroughly understood; and yet highly necessary to be perfectly known and considered by every man of rank or property, lest his ignorance of the points whereon they are founded should hurry him into faction and licentiousness on the one hand, or a pusillanimous indifference and criminal submission on the other. And we

(16) Either at the assizes or quarter sessions. The punishment for offending against this act not to exceed a fine of 100*l.* and imprisonment for three months. Upon the trial of lord George Gordon, lord Mansfield and the court declared, that they were clearly of opinion that this statute was not in any degree affected by the bill of rights. 1 *W. & M. st.* 2. c. 2. *Doug.* 571.

have seen that these rights consist, primarily, in the free enjoyment of personal security, of personal liberty, and of private property. So long as these remain inviolate, the subject is perfectly free; for every species of compulsive tyranny and oppression must act in opposition to one or other of these rights, having no other object upon which it can possibly be employed. To preserve these from violation, it is necessary that the constitution of parliament be supported in its full vigour; and limits, certainly known, be set to the royal prerogative. And, lastly, to vindicate these rights when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next, to the right of petitioning the king and parliament for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and defence. And all these rights and liberties it is our birthright to enjoy entire; unless where the laws of our country have laid them under necessary restraints. Restraints in themselves so gentle and moderate, as will appear upon farther inquiry, that no man of sense or probity would wish to see them slackened. For all of us have it in our choice to do every thing that a good man would desire to do; and are restrained from nothing, but what would be pernicious either to ourselves or our fellow-citizens. So that this review of our situation may [145] fully justify the observation of a learned French author, who indeed generally both thought and wrote in the spirit of genuine freedom[z]; and who hath not scrupled to profess, even in the very bosom of his native country, that the English is the only nation in the world where political or civil liberty is the direct end of its constitution. Recommending therefore to the student in our laws a farther and more accurate search into this extensive and important title, I shall close my remarks upon it with the expiring wish of the famous father Paul to his country, "ESTO PERPETUA!"

[z] Montesq. Sp. L. xi. 5.

CHAPTER THE SECOND.

OF THE PARLIAMENT.

WE are next to treat of the rights and duties of persons, as they are members of society, and stand in various relations to each other. These relations are either public or private: and we will first consider those that are public.

THE most universal public relation, by which men are connected together, is that of government; namely, as governors and governed, or, in other words, as magistrates and people. Of magistrates some also are *supreme*, in whom the sovereign power of the state resides; others are *subordinate*, deriving all their authority from the supreme magistrate, accountable to him for their conduct, and acting in an inferior secondary sphere.

IN all tyrannical governments the supreme magistracy, or the right both of *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he as legislator thinks proper to give himself. But, where the legislative and executive authority are in distinct hands, the former will take care not to intrust the latter with so large a power, as may tend to the subversion of its own independence, and therewith of the liberty of the subject. With us therefore in England this supreme power is divided

into two branches; the one legislative, to wit, the parliament, consisting of king, lords, and commons; the other executive, consisting of the king alone. It will be the business of this chapter to consider the British parliament; in which the legislative power, and (of course) the supreme and absolute authority of the state, is vested by our constitution.

THE original or first institution of parliament is one of those matters which lie so far hidden in the dark ages of antiquity, that the tracing of it out is a thing equally difficult and uncertain. The word, *parliament*, itself (*parlement* or *colloquium*, as some of our historians translate it,) is comparatively of modern date; derived from the French, and signifying an assembly that met and conferred together. It was first applied to general assemblies of the states under Louis VII. in France, about the middle of the twelfth century [a](1). But

a Mod. Un. Hist. xxiii. 307. The first mention of it in our statute law is in the preamble to the statute of Westm. 1. 3 Edw. I. A. D. 1273.

(1) The word *parliamentum* was not used in England till the reign of Henry III. (*Pryn. on 4 Inst.* 2.) Sir Henry Spelman in his Glossary, (*voc. Parl.*) says, *Johannes rex haud dicam parliamentum, nam hoc nomen non tum emicuit, sed communis concilii regni formam et coactionem perspicuam dedit.*

It was from the use of the word *parliamentum* that Prynne discovered lord Coke's manuscript, *Modus tenendi parliamentum tempore regis Edwardi, filii regis Etheldredi, &c.* to be spurious. Lord Coke set a high value upon it, and has assured us, "that certain it is, this "*modus* was rehearsed and declared before the conqueror at the con- "quest, and by him approved." (4 *Inst.* 12.) But for many reigns after this word was introduced, it was indiscriminately applied to a session and to the duration of the writ of summons; we now confine it to the latter, viz. to the period between the meeting after the return of the writ of summons and the dissolution. Etymology is not always frivolous pedantry; it sometimes may afford an useful comment upon the original signification of a word. No inconsiderable pains have been bestowed by learned men in analysing the word *parliament*; though the following specimens will serve rather to amuse than to instruct: "The word

it is certain that, long before the introduction of the Norman language into England, all matters of importance were debated and settled in the great councils of the realm. A practice, which seems to have been universal among the northern nations, particularly the Germans[b]; and carried

[b] De minoribus rebus principes consultant, de majoribus omnes. Tac. de mor. Germ. c. 11.

"parliament," saith one, "is compounded of *parium lamentum*; "because (as he thinks) the peers of the realm did at these assemblies "lament and complain each to the other of the enormities of the coun- "try, and thereupon provided redress for the same." (*Lamb. Arch.* 235.) Whitelocke, in his notes (174.), declares, "that this derivation "of parliament is a sad etymology." Lord Coke and many others say, that "it is called parliament, because every member of that court "should sincerely and discretely *parler la ment*, speak his mind for the "general good of the commonwealth." (*Co. Litt.* 110.) Mr. Lambard informs us, that "Lawrence Vallo misliketh this derivation." (*Arch.* 236.) And Lawrence Vallo is not singular; for Mr. Barrington assures us, that "lord Coke's etymology of the word parliament "from speaking one's mind has been long exploded. If one might pre- "sume (adds he) to substitute another in its room after so many "guesses by others, I should suppose it was a compound of the two "Celtic words *parley* and *ment*, or *mend*. Both these words are to be "found in Bullet's Celtic Dictionary published at Besancon in 1754. 3d "vol. fol. He renders *parley* by the French infinitive *parler*; and we "use the word in England as a substantive, viz. *parley*; *ment* or *mend* "is rendered *quantité, abondance*. The word parliament therefore being "resolved into its constituent syllables, may not improperly be said "to signify what the Indians of North America call a Great Talk." (Ant. Stat. 48.) I shall leave it to the reader to determine which of these derivations is most descriptive of a parliament; and perhaps after so much recondite learning it may appear presumptuous in me to observe, that parliament imported originally nothing more than a council or conference; and that *ment* in parliament has no more signification than it has in impeachment, engagement, imprisonment, hereditament, and a thousand others of the same nature, though the civilians have adopted a similar derivation, viz. testament from *testari mentem*. Tay. Civ. Law. 70.

by them into all the countries of Europe, which they overran at the dissolution of the Roman empire. Relics of which constitution, under various modifications and changes, are still to be met with in the diets of Poland, Germany, and Sweden, and the assembly of the estates in France[c]: for what is there now called the parliament is only the supreme court of justice, consisting of the peers, certain dignified ecclesiastics and judges; which neither is in practice, nor is supposed to be in theory, a general council of the realm.

WITH us in England this general council hath been held immemorially, under the several names of *mychel-synoth* or great council, *michel-gemote* or great meeting, and [148] more frequently *wittena-gemote*, or the meeting of wise men. It was also styled in Latin, *commune concilium regni*, *magnum concilium regis*, *curia magna*, *conventus magnatum vel procerum*, *assisa generalis*, and sometimes *communitas regni Angliae*[d]. We have instances of its meeting to order the affairs of the kingdom, to make new laws, and to amend the old, or, as Fleta[e] expresses it, "*novis injuriis emersis nova constituere remedia*," so early as the reign of Ina king of the West Saxons, Offa king of the Mercians, and Ethelbert king of Kent, in the several realms of the heptarchy. And, after their union, the mirror[f] informs us, that king Alfred ordained for a perpetual usage, that these councils should meet twice in the year, or oftener, if need be, to treat of the government of God's people; how they should keep themselves from sin, should live in quiet, and should receive right. Our succeeding Saxon and Danish monarchs held frequent councils of this sort, as appears from their respective codes of laws; the titles whereof usually speak them to be enacted, either by the king with the advice of his wittena-gemote, or wise men, as, "*haec sunt instituta, quae Edgarus rex consilio sapientum suorum instituit;*" or to be enacted by those sages

c These were assembled for the last time, A. D. 1561. (See Whitelocke of parl. c. 72.) or according to Robertson, A. D. 1614. (Hist. Ch. V. i. 369.)

d Glanvil. l. 13. c. 32. l. 9. c. 10. Pref. 9 Rep. 2 Inst. 526.

e l. 2. c. 2.

f c. 1. sec. 3.

with the advice of the king, as, "*haec sunt judicia, quae sapientes consilio regis Ethelstani instituerunt;*" or lastly, to be enacted by them both together, as "*haec sunt institutiones, quas rex Edmundus et episcopi sui cum sapientibus suis instituerunt.*"

THERE is also no doubt but these great councils were occasionally held under the first princes of the Norman line. Glanvil, who wrote in the reign of Henry the second, speaking of the particular amount of an amercement in the sheriff's court, says, it had never been yet ascertained by the general assize, or assembly, but was left to the custom of particular counties[g]. Here the general assize is spoken of as a meeting well known, and its statutes or decisions are put in a manifest contradistinction to custom, or the [149] common law. And in Edward the third's time an act of parliament, made in the reign of William the conqueror, was pleaded in the case of the abbey of St. Edmund's-bury, and judicially allowed by the court[h].

HENCE it indisputably appears, that parliaments or general councils, are coeval with the kingdom itself. How those parliaments were constituted and composed, is another question, which has been matter of great dispute among our learned antiquaries; and, particularly, whether the commons were summoned at all; or if summoned, at what period they began to form a distinct assembly. But it is not my intention here to enter into controversies of this sort. I hold it sufficient that it is generally agreed, that in the main the constitution of parliament, as it now stands, was marked out so long ago as the seventeenth year of king John, *A. D.* 1215, in the great charter granted by that prince; wherein he promises to summon all archbishops, bishops, abbots, earls, and greater barons, personally; and all other tenants in chief under the crown, by the sheriff and bailiffs; to meet at a certain place,

g Quanta esse debeat per nullam assisam generalem determinatum est, sed pro consuetudine singulorum comitatuum debetur. l. 9. c. 10.

h Year book. 21 Edw. III. 69.

with forty days notice, to assess aids and scutages when necessary. And this constitution has subsisted in fact at least from the year 1266, 49 Hen. III. there being still extant writs of that date, to summon knights, citizens and burgesses to parliament (2). I proceed therefore to inquire wherein consists this constitution of parliament, as it now stands, and has stood for the space of at least five hundred years. And in the prosecution of this inquiry, I shall consider, first, the manner and time of its assembling: secondly, its constituent parts: thirdly, the laws and customs relating to parliament, considered as one aggregate body: fourthly and fifthly, the laws and customs relating to each house separately and distinctly taken: sixthly, the methods of proceeding, and of making statutes, in both houses: and lastly, the manner of the parliament's adjournment, prorogation, and dissolution.

[150] I. As to the manner and time of assembling. The parliament is regularly to be summoned by the king's writ or letter, issued out of chancery by advice of the privy council, at least forty days before it begins to sit (3). It is a branch of the royal prerogative, that no parliament can be convened by its own authority, or by the authority of any, except the king alone. And this prerogative is founded upon very good reason. For, suppoing it had a right to meet

(2) The origin and progress of parliaments and our constitution will be discussed at large in the supplemental volume.

(3) This is a provision of the magna charta of king John: *faciemus summoneri, &c. ad certum diem scilicet ad terminum quadraginta dierum ad minus et ad certum locum.* (Black. Mag. Ch. Joh. 14.) It is enforced by 7 & 8 W. c. 25. which enacts, that there shall be forty days between the teste and the return of the writ of summons; and this time is by the uniform practice since the union extended to fifty days. (2 *Hats.* 235.) This practice was introduced by the 22d article of the act of union, which required that time between the teste and the return of the writ of summons for the first parliament of Great Britain.

spontaneously, without being called together, it is impossible to conceive that all the members, and each of the houses, would agree unanimously upon the proper time and place of meeting; and if half of the members met, and half absented themselves, who shall determine which is really the legislative body, the part assembled, or that which stays away? It is therefore necessary that the parliament should be called together at a determinate time and place; and highly becoming its dignity and independence, that it should be called together by none but one of its own constituent parts: and, of the three constituent parts, this office can only appertain to the king; as he is a single person, whose will may be uniform and steady; the first person in the nation, being superior to both houses in dignity; and the only branch of the legislature that has a separate existence, and is capable of performing any act at a time when no parliament is in being[i]. Nor is it an exception to this rule that, by some modern statutes, on the demise of a king or queen, if there be then no parliament in being, the last parliament revives, and it is to sit again for six months, unless dissolved by the successor: for this revived parliament must have been originally summoned by the crown (4).

IT is true, that by a statute, 16 Car. I. c. 1. it was [151] enacted, that, if the king neglected to call a parliament for three years, the peers might assemble and issue out writs for choosing one; and, in case of neglect of the peers, the constituents might meet and elect one themselves.

i By motives somewhat similar to these the republic of Venice was actuated, when towards the end of the seventh century it abolished the tribunes of the people, who were annually chosen by the several districts of the Venetian territory, and constituted a doge in their stead; in whom the executive power of the state at present resides. For which their historians have assigned these, as the principal reasons. 1. The propriety of having the executive power a part of the legislative, or senate; to which the former annual magistrates were not admitted. 2. The necessity of having a single person to convoke the great council when separated. (Mod. Un. Hist. xxvii. 15.)

(4) See page 188.

But this, if ever put in practice, would have been liable to all the inconveniences I have just now stated: and the act itself was esteemed so highly detrimental and injurious to the royal prerogative, that it was repealed by statute 16 Car. II. c. 1. From thence therefore no precedent can be drawn.

It is also true, that the convention-parliament, which restored king Charles the second, met above a month before his return; the lords by their own authority, and the commons in pursuance of writs issued in the name of the keepers of the liberty of England by authority of parliament: and that the said parliament sat till the twenty-ninth of December, full seven months after the restoration; and enacted many laws, several of which are still in force. But this was for the necessity of the thing, which supersedes all law; for if they had not so met, it was morally impossible that the kingdom should have been settled in peace. And the first thing done after the king's return was to pass an act declaring this to be a good parliament, notwithstanding the defect of the king's writs[i]. So that, as the royal prerogative was chiefly wounded by their so meeting, and as the king himself, who alone had a right to object, consented to wave the objection, this cannot be drawn into an example in prejudice of the rights of the crown. Besides we should also remember, that it was at that time a great doubt among the lawyers[k], whether even this healing act made it a good parliament; and held by very many in the negative: though it seems to have been too nice a scruple (5). And yet out of abundant caution, it was thought necessary to confirm its acts in the next parliament, by statute 13 Car. II. c. 7. & c. 14.

i Stat. 12 Car. II. c. 1. k 1 Sid. 1.

(5) William Drake, a merchant of London, was impeached for writing a pamphlet entitled, *The Long Parliament revived*, in which he maintained, that there could be no legislative authority till that was legally and regularly dissolved by the king and the two house of parliament, according to the 16 Car. I. c. 7. *Com. Jour.* 20 Nov. 1660.

It is likewise true, that at the time of the revolution, *A. D.* 1688, the lords and commons by their own authority, and upon the summons of the prince of Orange, (afterwards king William,) met in a convention, and therein disposed of the crown and kingdom. But it must be remembered, that this assembling was upon a like principle of necessity as at the restoration; that is, upon a full conviction that king James the second had abdicated the government, and that the throne was thereby vacant: which supposition of the individual members was confirmed by their concurrent resolution, when they actually came together. And, in such a case as the palpable vacancy of a throne, it follows *ex necessitate rei*, that the form of the royal writs must be laid aside, otherwise no parliament can ever meet again. For, let us put another possible case, and suppose, for the sake of argument, that the whole royal line should at any time fail and become extinct, which would indisputably vacate the throne: in this situation it seems reasonable to presume, that the body of the nation, consisting of lords and commons, would have a right to meet and settle the government; otherwise there must be no government at all. And upon this and no other principle did the convention in 1688 assemble. The vacancy of the throne was precedent to their meeting without any royal summons, not a consequence of it. They did not assemble without writ, and then make the throne vacant; but, the throne being previously vacant by the king's abdication, they assembled without writ, as they must do if they assembled at all. Had the throne been full, their meeting would not have been regular; but as it was really empty, such meeting became absolutely necessary. And accordingly it is declared by statute 1 W. and M. st. 1. c. 1. that this convention was really the two houses of parliament, notwithstanding the want of writs or other defects of form. So that, notwithstanding these two capital exceptions, which were justifiable only on a principle of necessity, (and each of which, by the

way, induced a revolution in the government,) the rule laid down is in general certain, that the king, only, can convoke a parliament.

And this by the ancient statutes of the realm[1] he is bound to do every year, or oftener, if need be. Not that he is, or ever was, obliged by these statutes to call a *new* parliament every year; but only to permit a parliament to sit annually for the redress of grievances, and despatch of business, *if need be* (6). These last words are so loose and vague, that such of

1 4 Edward III. c. 14. 36 Edw. III. c. 10.

(6) Mr. Granville Sharp, in a treatise published some years ago, argued ingeniously against this construction of the 4 Ed. III. and maintained, that the words, *if need be*, referred only to the preceding word, *oftener*. So that the true signification was, that a parliament should be held once every year at all events; and if there should be any need to hold it oftener, then more than once. (See his Declaration, &c. p. 166.) The cotemporary records of parliament, in some of which it is so expressed without any ambiguity, prove beyond all controversy that this is the true construction. In ancient times many favourite laws were frequently re-enacted. In the 50 Ed. III. it is expressly and absolutely declared, that a parliament should be held once a year. (*Rot. Parl.* No. 186.) In the 1 R. II. we find again another petition from the commons, that a parliament should be held once a year *at the least*: "Que "*plese a nre dit Sr de tenir parlement un foetz par an au meyns, et cee en* "*lieu convenable.*" The king's answer is, "As to that parliament shall "be held every year, let the statutes thereupon be kept and preserved; "but as to the place where the parliament shall be held, the king will "therein do his pleasure." (*Rot. Parl.* No. 95.) And in the next year, the king declared he had summoned the parliament, because it was ordained that parliament should be held once a year. (*Rot. Parl.* 2 R. II. No. 4.)

But I can by no means agree with Mr. Sharp, and those who contend that it is the meaning of these records and statutes that there should be an election every year. The word parliament at that time did not necessarily include any such idea; for it is every where applied to a session without any distinction, whether it was held after a prorogation or a dissolution. (*Rot. Parl. passim.*) It is true that for some time after the house of commons was regularly established dissolutions were frequent; for at

our monarchs as were inclined to govern without parliaments, neglected the convoking them sometimes for a very considerable period, under pretence that there was no need of them. But, to remedy this, by the statute 16 Car. II. c. 1. it is enacted, that the sitting and holding of parliaments shall not be intermitted above three years at the most. And by the statute 1 W. and M. st. 2. c. 2. it is declared to be one of the rights of the people, that for redress of all grievances, and for the amending, strengthening, and preserving the laws, parliaments ought to be held *frequently*. And this indefinite *frequency* is again reduced to a certainty by statute 6 W. & M. c. 2. which enacts, as the statute of Charles the second had

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that time the electors were few, and a seat in parliament was considered rather a burden to be avoided than a distinction to be solicited; and the members were not enabled to recover their wages till the king had discharged them from further attendance, by putting an end to the parliament. In the first reigns after the representation of the commons was established, the duration and intermissions of parliaments were short; but for several reigns preceding the revolution, both had become extended to such a length, that it became necessary for the parliament to interpose its authority, and fix some limits to its own existence.

In the following reigns, the longest durations and intermissions were nearly as follow:

	Duration.	Intermission.
Hen. VIII.	6 years	6 years.
Edw. VI.	4	—
Eliz.	11	4
Ja. I.	9	6
Ch. I.	8	12
Ch. II.	17	4

See the printed Report of the Committee to examine Precedents in Impeachments, 19 April 1791, (p. 16. *et seq.*) In Ireland there was no regular meeting of the parliament from 1666 till 1692; and from the reign of Queen Anne in 1703, it assembled only once in two years, till 1783; since which time it has sat every year as in England. (*Lord Mountmor.* 419.)

done before, that a new parliament shall be called within three years[m] after the determination of the former (7).

II. The constituent parts of a parliament are the next objects of our inquiry. And these are, the king's majesty, sitting there in his royal political capacity, and the three estates of the realm; the lords spiritual, the lords temporal, (who sit, together with the king, in one house) and the commons, who sit by themselves in another. And the king and these three estates, together, form the great corporation or body politic of the kingdom[n], of which the king is said to be *caput, principium, et finis*. For upon their coming together the king meets them, either in person or by representation; without which there can be no beginning of a parliament[o]; and he also has alone the power of dissolving them.

[154] It is highly necessary for preserving the balance of the constitution, that the executive power should be a branch, though not the whole, of the legislative. The total union of them, we have seen, would be productive of tyranny; the total disjunction of them, for the present, would in the end

m This is the same period, that is allowed in Sweden for intermitting their general diets, or parliamentary assemblies. Mod. Un. Hist. xxxiii. 15.

n 4 Inst. 1, 2. Stat. 1 Eliz. c. 3. Hale of Parl. 1.

o 4 Inst. 6.

(7) This part of the statute 6 W. & M. c. 2. confirms the statute 16 Car. II. c. 1. in declaring, that there shall not be a longer interval than three years after a dissolution; but the 16 Car. II. seems to be more extensive in its operation, by providing that there shall not be an intermission of more than three years after any sitting of Parliament, which will extend also to a prorogation. But as the mutiny act, and the land-tax and malt-tax acts are passed for one year only, these two statutes are now of little avail, for the parliament must necessarily be summoned for the despatch of business once every year. In ancient times, especially before the abolition of the feudal tenures at the restoration of Ch. II. our kings had such a revenue, independent of parliament, that they were enabled to reign many years together without the assistance of parliament, and in defiance of the statutes mentioned in the preceding note.

produce the same effects, by causing that union against which it seems to provide. The legislative would soon become tyrannical, by making continual encroachments, and gradually assuming to itself the rights of the executive power. Thus the long parliament of Charles the first, while it acted in a constitutional manner with the royal concurrence, redressed many heavy grievances and established many salutary laws. But when the two houses assumed the power of legislation, in exclusion of the royal authority, they soon after assumed likewise the reins of administration; and, in consequence of these united powers, overturned both church and state, and established a worse oppression than any they pretended to remedy. To hinder therefore any such encroachments, the king is himself a part of the parliament: and, as this is the reason of his being so, very properly therefore the share of legislation, which the constitution has placed in the crown, consists in the power of *rejecting* rather than *resolving*; this being sufficient to answer the end proposed. For we may apply to the royal negative, in this instance, what Cicero observes of the negative of the Roman tribunes, that the crown has not any power of *doing* wrong, but merely of *preventing* wrong from being done [p]. The crown cannot begin of itself any alterations in the present established law; but it may approve or disapprove of the alterations suggested and consented to by the two houses. The legislative therefore cannot abridge the executive power of any rights which it now has by law, without its own consent; since the law must perpetually stand as it now does, unless all the powers will agree to alter it. And herein indeed consists the true excellence of the English government, that all the parts of it form a mutual check upon each other. In the legislature, the people are a [155] check upon the nobility, and the nobility a check upon the people; by the mutual privilege of rejecting what the other has resolved: while the king is a check upon both, which

p Sulla....tribunis plebis non lege injuriae faciendae potestatem ademit, auxilii ferendi reliquit. De LL. 3. 9.

preserves the executive power from encroachments. And this very executive power is again checked and kept within due bounds by the two houses, through the privilege they have of inquiring into, impeaching, and punishing the conduct (not indeed of the king[q], which would destroy his constitutional independence; but, which is more beneficial to the public) of his evil and pernicious counsellors. Thus every branch of our civil polity supports and is supported, regulates and is regulated, by the rest: for the two houses naturally drawing in two directions of opposite interest, and the prerogative in another still different from them both, they mutually keep each other from exceeding their proper limits; while the whole is prevented from separation, and artificially connected together by the mixed nature of the crown, which is a part of the legislative, and the sole executive magistrate. Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by itself, would have done; but at the same time in a direction partaking of each, and formed out of all; a direction which constitutes the true line of the liberty and happiness of the community.

Let us now consider these constituent parts of the sovereign power, or parliament, each in a separate view. The king's majesty will be the subject of the next, and many subsequent chapters, to which we must at present refer.

The next in order are the spiritual lords. These consist of two archbishops, and twenty-four bishops; and at the dissolution of monasteries by Henry VIII, consisted likewise of twenty-six mitred abbots, and two priors[r]: a very considerable body, and in those times equal in number to the temporal nobility[s] (8). All these hold, or are supposed to hold, certain ancient baronies under the king: for William the con-

q Stat. 12 Car. II. c. 30. r Seld. tit. hon. 2. 5. 27. s Co. Litt. 97.

(8) In the place referred to, lord Coke says there were twenty-seven abbots and two priors, and he is there silent respecting the

queror thought proper to change the spiritual tenure of frank-almoign or free alms, under which the bishops held their lands during the Saxon government, into the feodal or Norman tenure by barony; which subjected their estates to all civil charges and assessments, from which they were before exempt[s]: and, in right of succession to those baronies, which were unalienable from their respective dignities, the bishops and abbots were allowed their seats in the house of lords[t]. But though these lords spiritual are in the eye of the law a distinct estate from the lords temporal, and are so distinguished in most of our acts of parliament, yet in practice they are usually blended together under the one name of *the lords*; they intermix in their votes; and the majority of such intermixture joins both estates. And from this want of a separate assembly and separate negative of the prelates, some writers have argued[u] very cogently, that the lords spiritual and temporal are now in reality only one estate[w]: which is unquestionably true in every effectual sense, though the ancient distinction between them still nominally continues. For if a bill should pass their house, there is no doubt of its validity, though every lord spiritual should vote against it; of which Selden[x], and

s Gilb. Hist. Exch. 55. Spelm. W. I. 291.

t Glanv. 7. 1. Co. Litt. 97. Seld. tit. hon. 2. 5. 19.

u Whitelocke on Parliam. c. 72. Warburt. Alliance. b. 2. c. 3.

w Dyer. 60.

x Baronage. p. 1. c. 6. The act of uniformity, 1 Eliz. c. 2. was passed with the dissent of all the bishops; (Gibs. codex. 236.) and therefore the style of *lords spiritual* is omitted throughout the whole (9).

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number of the temporal peers; but in the first page of the 4th Institute, he tells us their number, when he is then writing, is 106, and the number of the commons 493.

(9) No rational or ancient principle can perhaps be suggested, why the bishops should not have exactly the same legislative functions as the other peers of parliament; the style of the house of lords, viz. the lords spiritual and temporal, was probably intended as a compliment to the bishops, to express the precedence which they are entitled to before all the temporal barons, which originally was the only character that gave a claim to a seat in the house of lords. Unless prece-

sir Edward Coke[y], give many instances: as, on the other hand, I presume it would be equally good, if the lords temporal present were inferior to the bishops in number, and every one of those temporal lords gave his vote to reject the bill; though sir Edward Coke seems to doubt[z] whether this would not be an *ordinance*, rather than an *act*, of parliament.

[157] The lords temporal consist of all the peers of the realm (the bishops not being in strictness held to be such, but merely lords of parliament[a]) by whatever title of nobility distinguished; dukes, marquisses, earls, viscounts, or barons; of which dignities we shall speak more hereafter. Some of these sit by descent, as do all ancient peers; some by creation, as do all new-made ones; others, since the union with Scotland, by election, which is the case of the sixteen peers, who represent the body of the Scots nobility. Their number is indefinite, and may be increased at will by the power of the crown: and once, in the reign of queen Anne, there was an instance of creating no less than twelve together; in contemplation of which, in the reign of king George the

y 2 Inst. 585, 6, 7. See Keilw. 184; where it is holden by the judges, 7 Hen. VIII. that the king may hold a parliament without any spiritual lords. This was also exemplified in fact in the two first parliaments of Charles II; wherein no bishops were summoned, till after the repeal of the statute 16 Car. I. c. 27. by statute 13 Car. II. st. 1. c. 2.

z 4 Inst. 25.

a Staunford, P. C. 153.

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dents could be found to the contrary, there seems to be no reason to doubt, but that any act at this day would be valid, though all the temporal lords or all the spiritual lords were absent.

In the 1 Eliz. c. 2. the style of the parliament is, the lords and commons in parliament assembled; but there is the same style used also in 1 Eliz. c. 11. a revenue act. Lord Mountmorres informs us, that on the 18th Feb. 1641, a motion was made in the Irish house of lords, "That as all the bishops were against a representation about certain "grievances, the lords spiritual should not be named: upon which the "judges were consulted; and their opinion was, that in any act or "order which passed, it must be entered by the lords spiritual and "temporal." 1 Vol. 344.

first, a bill passed the house of lords, and was countenanced by the then ministry, for limiting the number of the peerage. This was thought by some to promise a great acquisition to the constitution, by restraining the prerogative from gaining the ascendant in that august assembly, by pouring in at pleasure an unlimited number of new created lords. But the bill was ill-relished and miscarried in the house of commons, whose leading members were then desirous to keep the avenues to the other house as open and easy as possible.

The distinction of rank and honor is necessary in every well-governed state: in order to reward such as are eminent for their services to the public, in a manner the most desirable to individuals, and yet without burden to the community; exciting thereby an ambitious yet laudable ardor, and generous emulation, in others. And emulation, or virtuous ambition, is a spring of action, which, however dangerous or invidious in a mere republic or under a despotic sway, will certainly be attended with good effects under a free monarchy; where, without destroying its existence, its excesses may be continually restrained by that superior power, from which all honor is derived. Such a spirit, when nationally diffused, gives life and vigor to the community; it sets all the wheels of government in motion, which, under a wise regulator, may be directed to any beneficial [158] purpose; and thereby every individual may be made subservient to the public good, while he principally means to promote his own particular views. A body of nobility is also more peculiarly necessary in our mixed and compounded constitution, in order to support the rights of both the crown and the people, by forming a barrier to withstand the encroachments of both. It creates and preserves that gradual scale of dignity, which proceeds from the peasant to the prince; rising like a pyramid from a broad foundation, and diminishing to a point as it rises. It is this ascending and contracting proportion that adds stability to any government; for when the departure is sudden from one extreme to ano-

ther, we may pronounce that state to be precarious. The nobility therefore are the pillars, which are reared from among the people, more immediately to support the throne; and, if that falls, they must also be buried under its ruins. Accordingly, when in the last century the commons had determined to extirpate monarchy, they also voted the house of lords to be useless and dangerous. And since titles of nobility are thus expedient in the state, it is also expedient that their owners should form an independent and separate branch of the legislature. If they were confounded with the mass of the people, and like them had only a vote in electing representatives, their privileges would soon be borne down and overwhelmed by the popular torrent, which would effectually level all distinctions. It is therefore highly necessary that the body of nobles should have a distinct assembly, distinct deliberations, and distinct powers from the commons.

THE commons consist of all such men of property in the kingdom (10), as have not seats in the house of lords; every one of which has a voice in parliament, either personally, or by his representatives. In a free state every man, who is supposed a free agent, ought to be in some measure his own governor; and therefore a branch at least of the legislative power should reside in the whole body of the people. And this power, when the territories of the state are small and its citizens easily known, should be exercised by the [159] people in their aggregate or collective capacity, as was wisely ordained in the petty republics of Greece, and the first rudiments of the Roman state. But this will be highly inconvenient, when the public territory is extended to any considerable degree, and the number of citizens is in-

(10) The word commons, in its present ordinary signification, comprises all the people who are under the rank of peers, without any regard to property; but, in its original signification, it was confined to those only who had a right to sit, or had a right to vote for representatives in the house of commons.

creased. Thus when, after the social war, all the burghers of Italy were admitted free citizens of Rome, and each had a vote in the public assemblies, it became impossible to distinguish the spurious from the real voter, and from that time all elections and popular deliberations grew tumultuous and disorderly; which paved the way for Marius and Sylla, Pompey and Cæsar, to trample on the liberties of their country, and at last to dissolve the commonwealth. In so large a state as ours it is therefore very wisely contrived, that the people should do that by their representatives, which it is impracticable to perform in person; representatives, chosen by a number of minute and separate districts, wherein all the voters are, or easily may be, distinguished. The counties are therefore represented by knights, elected by the proprietors of lands: the cities and boroughs are represented by citizens and burgesses, chosen by the mercantile part or supposed trading interest of the nation; much in the same manner as the burghers in the diet of Sweden are chosen by the corporate towns, Stockholm sending four, as London does with us, other cities two, and some only one [b]. The number of English representatives is 513, and Scots 45; in all 558. And every member, though chosen by one particular district, when elected and returned serves for the whole realm. For the end of his coming thither is not particular, but general; not barely to advantage his constituents, but the *common* wealth; to advise his majesty (as appears from the writ of summons [c]) "*de communi consilio super negotiis quibusdam arduis et urgentibus, regem, statum, et defensionem regni Angliae et ecclesiae Anglicanae concernentibus.*" And therefore he is not bound, like a deputy in the united provinces, to consult with, or take the advice of, his constituents upon any particular point, unless he himself thinks it proper or prudent so to do.

THESE are the constituent parts of a parliament; [160] the king, the lords spiritual and temporal, and the com-

b Mod. Un. Hist. xxxiii. 18. c 4 Inst. 12.

mons. Parts, of which each is so necessary, that the consent of all three is required to make any new law that shall bind the subject. Whatever is enacted for law by one, or by two only, of the three is no statute; and to it no regard is due, unless in matters relating to their own privileges. For though, in the times of madness and anarchy, the commons once passed a vote[d], "that whatever is enacted or declared for law by the "commons in parliament assembled hath the force of law; "and all the people of this nation are concluded thereby, "although the consent and concurrence of the king or house "of peers be not had thereto (11);" yet, when the constitution was restored in all its forms, it was particularly enacted by statute 13 Car. II. c. 1. that if any person shall maliciously or advisedly affirm, that both or either of the houses of parliament have any legislative authority without the king, such person shall incur all the penalties of a *praemunire*.

III. We are next to examine the laws and customs relating to parliament, thus united together and considered as one aggregate body.

The power and jurisdiction of parliament, says sir Edward Coke[e], is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. And of this high court, he adds, it may be truly said, "*si antiquitatem spectes, est vetustissima; si dignitatem, est honorantissima; si jurisdictionem, est capacissima.*" It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is

[d] 4 Jan. 1648. [e] 4 Inst. 36.

(11) This was a natural prologue to the tragical drama which was performed on the 30th of the same month.

intrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new-model the succession to the crown; as was done in the reign of Henry VIII and William III. It can alter the established religion of the land; as was done in a variety of instances, in the reigns of king Henry VIII and his three children. It can change and create afresh even the constitution of the kingdom and of parliaments themselves; as was done by the act of union, and the several statutes for triennial and septennial elections. It can, in short, do every thing that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament (12). True it is, that what the parliament doth, no authority upon earth can undo. So that it is a matter most essential to the liberties of this kingdom, that such members be delegated to this important trust, as are most eminent for their probity, their fortitude, and their knowledge; for it was a known apophthegm of the great lord treasurer Burleigh, "that England could never be ruined but by a parliament:" and, as sir Matthew Hale observes[f], this being the highest and greatest court, over which none other can have jurisdiction in the kingdom, if by any means a misgovernment should any way fall upon it, the subjects of this kingdom are left without all manner of remedy. To the same purpose the

[f] Of parliaments, 40.

(12) De Lolme has improved upon this, and has, I think, unwarrantably asserted, that "it is a fundamental principle with the English lawyers, that parliament can do every thing but make a woman a man, and a man a woman." (p. 134.) The omnipotence of parliament signifies nothing more than the supreme sovereign power of the state, or a power of action uncontrolled by any superior. In this sense, the king, in the exercise of his prerogatives, and the house of lords in the interpretation of laws, are also omnipotent; that is, free from the control of any superior provided by the constitution.

president Montesquieu, though I trust too hastily, presages[g], that as Rome, Sparta, and Carthage have lost their liberty and perished, so the constitution of England will in time lose its liberty, will perish: it will perish, whenever the legislative power shall become more corrupt than the executive.

It must be owned that Mr. Locke[h], and other theoretical writers, have held, that "there remains still inherent in the "people a supreme power to remove or alter the legislative, "when they find the legislative act contrary to the trust re-"posed in them: for, when such trust is abused, it is thereby "forfeited, and devolves to those who gave it." But however just this conclusion may be in theory, we cannot [162] practically adopt it, nor take any *legal* steps for carrying it into execution, under any dispensation of government at present actually existing. For this devolution of power, to the people at large, includes in it a dissolution of the whole form of government established by that people; reduces all the members to their original state of equality; and, by annihilating the sovereign power, repeals all positive laws whatsoever before enacted. No human laws will therefore suppose a case, which at once must destroy all law, and compel men to build afresh upon a new foundation; nor will they make provision for so desperate an event, as must render all legal provisions ineffectual[i]. So long therefore as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control.

In order to prevent the mischiefs that might arise, by placing this extensive authority in hands that are either incapable, or else improper, to manage it, it is provided by the custom and law of parliament[j], that no one shall sit or vote in either house, unless he be twenty-one years of age. This is also expressly declared by statute 7 & 8 W. III. c. 25. with regard to the house of commons; doubts having arisen,

g Sp. L. 11. 6.
h On Gov. p. 2. sec. 149. 227.
i See page 244.
j Whitelocke, c. 80. 4 Inst. 47.

from some contradictory adjudications, whether or no a minor was incapacitated from sitting in that house[k] (13). It is also enacted by statute 7 Jac. I. c. 6. that no member be permitted to enter into the house of commons, till he hath taken the oath of allegiance before the lord steward or his deputy (14): and by 30 Car. II. st. 2. and 1 Geo. I. c. 13. (15) that no member shall vote or sit in either house, till he hath in the presence of the house taken the oath of allegiance, supremacy, and abjuration, and subscribed and repeated the declaration against transubstantiation, and invocation of saints, and the sacrifice of the mass. Aliens, unless naturalized, were likewise by the law of parliament incapable to serve therein[l]: and now it is enacted, by statute 12 & 13 W. III. c. 2. that no alien, even though he be naturalized, shall be capable of being a member of either house of parliament. And there are not only these standing incapacities; but if any [163] person is made a peer by the king, or elected to serve in the house of commons by the people, yet may the respective houses upon complaint of any crime in such person, and

k Com. Journ. 16 Dec. 1600. l Com. Journ. 10 Mar. 1623, 18 Feb. 1628.

(13) According to ancient principles, minors, unless actually knighted, must have been disqualified; for, in general, no one was capable of performing the feudal services till he had attained the age of twenty-one. And one of the most important of these services was, attendance on the lord's court. But if the king had conferred the honor of knighthood upon a minor, then it was held that the imbecility of minority ceased. See note to p. 68. 2d vol.

(14) On the first day of the meeting of every new parliament, the lord steward of his majesty's household attends in a room adjoining to the house of commons, and administers an oath to the members present; and he then executes a commission or deputation, empowering any one or more of a great number of members specified in it, to administer the oath to others. *Com. Jour.*

(15) The oath of abjuration was altered by 6 Geo. III. c. 53. upon the death of the pretender.

proof thereof, adjudge him disabled and incapable to sit as a member[m]: and this by the law and custom of parliament (16).

m Whitelocke of parl. c. 102. See Lord's Journ. 3 May 1690. 13 May 1694. 26 May 1725. Com. Journ. 14 Feb. 1580. 21 Jun. 1628. 9 Nov. 21 Jan. 1640. 6 Mar. 1676. 6 Mar. 1711. 17 Feb. 1769.

(16) This sentence was not in the first editions, but was added, no doubt, by the learned Judge, with an allusion to the Middlesex election. The circumstances of that case were briefly these: On the 19 Jan. 1764, Mr. Wilkes was expelled the house of commons, for being the author of a paper called the North Briton, No. 45. At the next election, in 1768, he was elected for the county of Middlesex; and on 3 Feb. 1769, it was resolved that John Wilkes, Esq. having published several libels specified in the Journals, *be expelled this house*; and a new writ having been ordered for the county of Middlesex, Mr. Wilkes was re-elected without opposition; and on the 17 Feb. 1769, it was resolved, that "John Wilkes, Esq. having been in this session of par-"liament expelled this house, was and is incapable of being elected a "member to serve in this present parliament;" and the election was declared void, and a new writ ordered. He was a second time re-elected without opposition, and on 17 March 1769, the house again declared the election void, and ordered a new writ. At the next election, Mr. Luttrel, who had vacated his seat by accepting the Chiltern Hundreds, offered himself a candidate against Mr. Wilkes. Mr. Wilkes had 1143 votes, and Mr. Luttrel 296. Mr. Wilkes was again returned by the sheriff. On the 15 April 1769, the house resolved, that Mr. Luttrel ought to have been returned, and ordered the return to be amended. On the 29 April, a petition was presented by certain freeholders of Middlesex, against the return of Mr. Luttrel; and on the 8 May, the house resolved that Mr. Luttrel was duly elected. On the 3 May 1783, it was resolved, that the resolution of the 17 Feb. 1769 should be expunged from the Journals of the house, as being subversive of the rights of the whole body of electors of this kingdom. And at the same time it was ordered, that all the declarations, orders, and resolutions respecting the election of John Wilkes, Esq. should be expunged. The history of England furnishes many instances of important constitutional questions that have deeply agitated the minds of

For, as every court of justice hath laws and customs for its direction, some the civil and canon, some the common law, others their own peculiar laws and customs, so the high court of parliament hath also its own peculiar law, called the *lex et consuetudo parliamenti*; a law which sir Edward Coke[n] observes is, "*ab omnibus quaerenda, a multis ignora-*"*ta* (17) *a paucis cognita.*" It will not therefore be expected that we should enter into the examination of this law, with any degree of minuteness: since, as the same learned author assures us[o], it is much better to be learned out of the rolls of parliament, and other records, and by precedents, and continual experience, than can be expressed by any one man. It will be sufficient to observe, that the whole of the law and custom of parliament has its original from this one maxim, "that whatever matter arises concerning either house of "parliament, ought to be examined, discussed, and adjudged

n 1 Inst. 11. o 4 Inst. 50.

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the people of this country, which can raise little or no doubt in the minds of those who view them at a distance uninfluenced by interest or passion. It might perhaps be a violent measure in the house of commons to expel a member for the libels which he had published; but that the subsequent proceedings were agreeable to the law of parliament, that is, to the law of the land, the authorities here referred to by the learned Judge, I conceive, do most unanswerably prove. It is supposed that the resolution of the 17 Feb. 1769, was considered to be subversive of the rights of electors, because it assigned expulsion alone, without stating the criminality of the member to be the cause of his incapacity during that parliament. But as his offences were particularly described in the resolution by which he was expelled on the 3d of the same month, no one could possibly doubt but the latter resolution had as clear a reference to the former, as if it had been repeated in it word for word.

(17) Lord Holt has observed, that "as to what my Lord Coke says, "that the *lex parliamenti est a multis ignorata*, is only because they "will not apply themselves to understand it." 2 *Ld. Ray.* 1114.

"in that house to which it relates, and not elsewhere[p]." Hence, for instance, the lords will not suffer the commons to interfere in settling the election of a peer of Scotland; the commons will not allow the lords to judge of the election of a burgess; nor will either house permit the subordinate courts of law to examine the merits of either case. But the maxims upon which they proceed, together with the method of proceeding, rest entirely in the breast of the parliament itself; and are not defined and ascertained by any particular stated laws (18).

[164] THE *privileges* of parliament are likewise very large and indefinite. And therefore when in 31 Hen. VI. the house of lords propounded a question to the judges concerning them, the chief justice, sir John Fortescue, in the name of his brethren, declared, "that they ought not to make "answer to that question: for it hath not been used aforetime

[p] 4 Inst. 15.

(18) This sentence seems to imply a discretionary power in the two houses of parliament, which surely is repugnant to the spirit of our constitution. The law of parliament is part of the general law of the land, and must be discovered and construed like all other laws. The members of the respective houses of parliament are in most instances the judges of that law; and like the judges of the realm, when they are deciding upon past laws, they are under the most sacred obligation to inquire and decide what the law actually is, and not what, in their will and pleasure, or even in their reason and wisdom, it ought to be. When they are declaring what is the law of parliament, their character is totally different from that with which, as legislators, they are invested when they are framing new laws; and they ought never to forget the admonition of that great and patriotic chief justice lord Holt, viz. "that the authority of parliament is from the law, and as it "is circumscribed by law, so it may be exceeded; and if they do "exceed those legal bounds and authority, their acts are wrongful, "and cannot be justified any more than the acts of private men." 1 *Salk.* 505.

"that the justices should in any wise determine the privileges "of the high court of parliament. For it is so high and mighty "in its nature, that it may make law: and that which is "law, it may make no law: and the determination and "knowledge of that privilege belongs to the lords of parlia-"ment, and not to the justices[q]." Privilege of parliament was principally established, in order to protect its members not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the crown. If therefore all the privileges of parliament were once to be set down and ascertained, and no privilege to be allowed but what was so defined and determined, it were easy for the executive power to devise some new case, not within the line of privilege, and under pretence thereof to harass any refractory member and violate the freedom of parliament. The dignity and independence of the two houses are therefore in great measure preserved by keeping their privileges indefinite (19). Some however of the more notorious privileges of the members of either house are, privilege of speech, of person, of their domestics, and of their lands and

[q] Seld. Baronage, part 1. c. 4.

(19) In the observations above, upon the privileges of parliament, the Editor is obliged to differ from the learned Judge; he cannot but think that clearness and certainty are essentially necessary to the liberty of Englishmen. Mystery and ignorance are the natural parents of superstition and slavery. How can rights and privileges be claimed and asserted, unless they are ascertained and defined? The privileges of parliament, like the prerogatives of the crown, are the rights and privileges of the people. They ought all to be limited by those boundaries which afford the greatest share of security to the subject and constituent, who may be equally injured by their extension as their diminution. The privileges of the two houses ought certainly to be such as will best preserve the dignity and independence of their debates and councils without endangering the general liberty. But if they are left uncertain and indefinite, may it not be replied with equal force, that under the pretence thereof the refractory members may harass the executive power, and violate the freedom of the people?

goods (20). As to the first, privilege of speech, it is declared by the statute 1 W. and M. st. 2. c. 2. as one of the liberties of the people, "that the freedom of speech, and debates, and pro-"ceedings in parliament, ought not to be impeached or ques-"tioned in any court or place out of parliament." And this freedom of speech is particularly demanded of the king in person, by the speaker of the house of commons, at the opening of every new parliament. So likewise are the other privileges, of persons, servants, lands and goods: which are immunities as ancient as Edward the confessor; in whose laws we find this precept, "*ad synodos venientibus, sive* [165] "*summoniti sint, sive per se quid agendum habuerint,* "*sit summa pax:*" and so too, in the old Gothic constitutions, "*extenditur haec pax et securitas ad quatuordecim* "*dies, convocato regni senatu*[s]." This included formerly not only privilege from illegal violence, but also from legal arrests, and seizures by process from the courts of law. And still, to assault by violence a member of either house, or his menial servants, is a high contempt of parliament, and there punished with the utmost severity. It has likewise peculiar penalties annexed to it in the courts of law, by the statutes 5 Hen. IV. c. 6. and 11 Hen. VI. c. 11. Neither can any member of either house be arrested and taken into custody, unless for some indictable offence, without a breach of the privilege of parliament.

But all other privileges which derogate from the common law in matters of civil right, are now at an end, save only as to the freedom of the member's person: which in a peer (by the privilege of peerage) is for ever sacred and inviolable; and in a commoner (by the privilege of parliament) for forty days after every prorogation, and forty days before the next appointed meeting[t]; which is now in effect as long as the parliament subsists, it seldom being prorogued for more

r cap. 3. s Steirnh. de jure Goth. l. 3. c. 3. t 2 Lev. 72.

(20) The privileges of domestics, lands, and goods, are taken away by 10 Geo. III. c. 50. (See p. 165.)

than fourscore days at a time (21). As to all other privileges, which obstruct the ordinary course of justice, they were restrained by the statutes 12 W. III. c. 3. 2 & 3 Ann. c. 18. and 11 Geo. II. c. 24. and are now totally abolished by statute 10 Geo. III. c. 50. which enacts, that any suit may at any time be brought against any peer or member of parliament, their servants, or any other person entitled to privilege of parliament; which shall not be impeached or delayed by pretence of any such privilege; except that the person of a member of the house of commons shall not thereby be subjected to any arrest of imprisonment. Likewise, for the benefit of commerce, it is provided by statute 4 Geo. III. c. 33. that any trader, having privilege of parliament, may be served with legal process for any just debt to the amount of 100*l.* and unless he makes satisfaction within two months, it shall be deemed an act of bankruptcy; and [166] that commissions of bankrupt may be issued against such privileged traders in like manner as against any other.

THE only way by which courts of justice could anciently take cognisance of privilege of parliament was by writ of privilege, in the nature of a *supersedeas*, to deliver the party out of custody when arrested in a civil suit[u]. For when a letter was written by the speaker to the judges, to stay proceedings against a privileged person, they rejected it as contrary to their oath of office[v]. But since the statute 12 W. III. c. 3. which enacts that no privileged person shall be subject to arrest or imprisonment, it hath been held that such

u Dyer. 99. 4 Prym. Brev. Parl. 757. v Latch. 48. Noy. 83.

(21) It does not appear that the privilege from arrest is limited to any precise time after a dissolution; but it has been determined by all the judges that it extends to a convenient time. (*Col. Pit's case*, 2 *Str.* 988.) Prynne is of opinion that it continued for the number of days the member received wages after a dissolution, which were in proportion to the distance between his home and the place where the parliament was held. 4 *Parl. Writs*, 68.

arrest is irregular *ab initio*, and that the party may be discharged upon motion[w]. It is to be observed, that there is no precedent of any such writ of privilege, but only in civil suits; and that the statute of 1 Jac. I. c. 13. and that of king William (which remedy some inconveniences arising from privilege of parliament) speak only of civil actions. And therefore the claim of privilege hath been usually guarded with an exception as to the case of indictable crimes[x]; or as it hath been frequently expressed, of treason, felony, and breach (or surety) of the peace[y]. Whereby it seems to have been understood that no privilege was allowable to the members, their families, or servants, in any *crime* whatsoever; for all crimes are treated by the law as being *contra pacem domini regis*. And instances have not been wanting, wherein privileged persons have been convicted of misdemesnors, and committed, or prosecuted to outlawry, even in the middle of a session[z]; which proceeding has afterwards received the sanction and approbation of parliament[a]. To which may be added, that a few years ago, the case of writing and publishing seditious libels was resolved by
[167] both houses[b] not to be entitled to privilege (22); and that the reasons upon which that case proceeded[c], extended equally to every indictable offence. So that the chief, if not the only privilege of parliament, in such cases, seems to be the right of receiving immediate information of the imprisonment or detention of any member, with the reason for which he is detained: a practice that is daily used upon the slightest military accusations, preparatory to a trial

w Stra. 989.
x Com. Journ. 17 Aug. 1641.
y 4 Inst. 25. Com. Journ. 20 May 1675.
z Mich. 16 Edw. IV. in Seaech. Lord Raym. 1461.
a Com. Journ. 16 May 1726.
b Com. Journ. 24 Nov. Lords' Journ. 29 Nov. 1763.
c Lords' Protest. ibid.

(22) The contrary had been determined a short time before in the case of Mr. Wilkes by the unanimous judgment of lord Camden and the court of Common Pleas. 2 *Wils.* 251.

by a court martial[d]; and which is recognised by the several temporary statutes for suspending the *habeas corpus* act[e]; whereby it is provided, that no member of either house shall be detained, till the matter of which he stands suspected be first communicated to the house of which he is a member, and the consent of the said house obtained for his commitment or detaining. But yet the usage has uniformly been, ever since the revolution, that the communication has been subsequent to the arrest.

THESE are the general heads of the laws and customs relating to parliament, considered as one aggregate body. We will next proceed to

IV. THE laws and customs relating to the house of lords in particular. These, if we exclude their judicial capacity, which will be more properly treated of in the third and fourth books of these commentaries, will take up but little of our time.

ONE very ancient privilege is that declared by the charter of the forest[f], confirmed in parliament 9 Hen. III; *viz.* that every lord spiritual or temporal summoned to parliament, and passing through the king's forests, may, both in going and returning, kill one or two of the king's deer without warrant; in view of the forester if he be present, or on blowing a horn if he be absent: that he may not seem to take the king's venison by stealth.

IN the next place they have a right to be attended, [168] and constantly are, by the judges of the court of king's bench and common pleas, and such of the barons of the exchequer as are of the degree of the coif, or have been made serjeants at law; as likewise by the king's learned counsel, being serjeants, and by the masters of the court of chancery; for their advice in point of law, and for the greater dignity of their proceedings. The secretaries of state, with

d Com. Journ. 20 Apr. 1762. e Particularly 17 G. II. c. 8. f c. 11.

the attorney and solicitor general, were also used to attend the house of peers, and have to this day, (together with the judges, &c.) their regular writs of summons issued out at the beginning of every parliament[g], *ad tractandum et consilium impendendum*, though not *ad consentiendum*; but, whenever of late years they have been members of the house of commons[h], their attendance here hath fallen into disuse (23).

ANOTHER privilege is, that every peer, by license obtained from the king (24), may make another lord of parliament

g Stat. 31 Hen. VIII. c. 10. Smith's commonw. b. 2. c. 3. Moor. 551. 4 Inst. 4. Hale of Parl. 140.

h See Com. Journ. 11 Apr. 1614. 8 Feb. 1620. 10 Feb. 1625. 4 Inst. 46.

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(23) On account of this attendance there are several resolutions before the restoration, declaring the attorney-general incapable of sitting among the commons. Sir Heneage Finch, member for the university of Oxford, afterwards lord Nottingham and chancellor, was the first attorney-general who enjoyed that privilege. *Sim.* 28.

(24) This license has long ceased in Ireland; but the proxies in the English house of lords are still entered in Latin *ex licentiâ regis*: this created a doubt in Nov. 1788, whether the proxies in that parliament were legal on account of the king's illness? (1. *Ld. Mountm.* 342.) But this I conceive is now so much a mere form, that the license may be presumed. Proxies cannot be used in a committee. *Ib.* 106. A proxy cannot sign a protest in England, but he can in Ireland. (2 *Ib.* 191.)

The order that no lord should have more than two proxies was made 2 Car. I. because the duke of Buckingham had no less than fourteen. (1 *Rushw.* 269.)

A similar order was made in Ireland during lord Strafford's lieutenancy to correct a like abuse.

There is an instance in Wight, 50, where a proxy is called *litera attornatûs ad parliamentum*, which it is in effect. The peer who has the proxy is always called in Latin *procurator*. If a peer, after appointing a proxy, appears personally in parliament, his proxy is revoked and annulled. (4 *Inst.* 13.) By the orders of the house, no proxy shall vote upon a question of guilty or not guilty; and a spiritual lord shall only be a proxy for a spiritual lord, and a temporal lord for a temporal. Two or more peers may be proxy to one absent peer; but lord Coke is

his proxy, to vote for him in his absence[i]. A privilege, which a member of the other house can by no means have, as he is himself but a proxy for a multitude of other people[k].

EACH peer has also a right, by leave of the house, when a vote passes contrary to his sentiments, to enter his dissent on the journals of the house, with the reasons for such dissent; which is usually styled his protest (25).

ALL bills likewise, that may in their consequences any way affect the right of the peerage, are by the custom of parliament to have their first rise and beginning in the house of peers, and to suffer no changes or amendments in the house of commons.

THERE is also one statute peculiarly relative to the house of Lords; 6 Ann. c. 23. which regulates the election of the sixteen representative peers of North [169] Britain, in consequence of the twenty-second and twenty-third articles of the union: and for that purpose prescribes the oaths, &c. to be taken by the electors; directs the mode of balloting; prohibits the peers electing from being attended in an unusual manner; and expressly provides, that no other matter shall be treated of in that assembly, save only the election, on pain of incurring a *praemunire*.

V. THE peculiar laws and customs of the house of commons relate principally to the raising of taxes, and the elections of members to serve in parliament.

FIRST, with regard to taxes: it is the ancient indisputable privilege and right of the house of commons, that all grants of subsidies or parliamentary aids do begin in their house, and are first bestowed by them[l]; although their grants are not

i Seld. baronage, p. 1. c. 1. k 4 Inst. 12. l 4 Inst. 29.

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of opinion (4 *Inst.* 12.) that they cannot vote unless they all concur. 1 *Woodd.* 41.

(25) Lord Clarendon relates, that the first instances of protests with reasons in England were in 1641, before which time they usually only set down their names as dissentient to a vote: the first regular protest in Ireland was in 1662. (1 *Ld. Mountm.* 402.)

effectual to all intents and purposes, until they have the assent of the other two branches of the legislature. The general reason, given for this exclusive privilege of the house of commons, is, that the supplies are raised upon the body of the people, and therefore it is proper that they alone should have the right of taxing themselves. This reason would be unanswerable, if the commons taxed none but themselves: but it is notorious that a very large share of property is in the possession of the house of lords; that this property is equally taxable, and taxed, as the property of the commons; and therefore the commons not being the *sole* persons taxed, this cannot be the reason of their having the *sole* right of raising and modelling the supply. The true reason, arising from the spirit of our constitution, seems to be this. The lords being a permanent hereditary body, created at pleasure by the king, are supposed more liable to be influenced by the crown, and when once influenced to continue so, than the commons, who are a temporary elective body, freely nominated by the people. It would therefore be extremely dangerous to give the lords any power of framing new taxes for the subject; it is sufficient that they have a power of rejecting, if they think the commons too lavish [170] or improvident in their grants. But so reasonably jealous are the commons of this valuable privilege, that herein they will not suffer the other house to exert any power but that of rejecting; they will not permit the least alteration or amendment to be made by the lords to the mode of taxing the people by a money bill; under which appellation are included all bills, by which money is directed to be raised upon the subject, for any purpose or in any shape whatsoever; either for the exigencies of government, and collected from the kingdom in general, as the land tax; or for private benefit, and collected in any particular district, as by turnpikes, parish rates, and the like (26). Yet sir Matthew

(26) This rule is now extended to all bills for canals, paving, provision for the poor, and to every bill in which tolls, rates, or

Hale[m] mentions one case, founded on the practice of parliament in the reign of Henry VI[n], wherein he thinks the lords may alter a money bill: and that is, if the commons grant a tax, as that of tonnage and poundage, for *four years*; and the lords alter it to a less time, as for *two* years; here, he says, the bill need not be sent back to the commons for their concurrence, but may receive the royal assent without farther ceremony; for the alteration of the lords is consistent with the grant of the commons. But such an experiment will hardly be repeated by the lords, under the present improved idea of the privilege of the house of commons, and, in any case where a money bill is remanded to the commons, all amendments in the mode of taxation are sure to be rejected.

NEXT, with regard to the elections of knights, citizens, and burgesses; we may observe, that herein consists the exercise of the democratical part of our constitution: for in a democracy there can be no exercise of sovereignty but by suffrage, which is the declaration of the people's will. In all democracies therefore it is of the utmost importance to regulate by whom, and in what manner, the suffrages are to be given. And the Athenians were so justly jealous of this prerogative, that a stranger, who interfered in the assemblies of the people, was punished by their laws with death: be-

m On parliaments, 65, 66.

n Year book, 33 Hen. VI. 17. But see the answer to this case by Sir Heneage Finch. Com. Journ. 22 Apr. 1671.

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duties are ordered to be collected; and also to all bills in which pecuniary penalties and fines are imposed for offences. (3 *Hats.* 110.) But it should seem it is carried beyond its original spirit and intent, when the money raised is not granted to the crown.

Upon the application of this rule, there have been many warm contests between the lords and commons, in which the latter seem always to have prevailed. See many conferences collected by Mr. Hatsel, in his Appendix to the 3d vol.

In Appendix D, the conference of 20 and 22 April, 1671, the general question is debated with infinite ability on both sides, but particularly on the part of the commons in an argument drawn up by Sir Heneage Finch, then attorney-general.

cause such a man was esteemed guilty of high treason, by usurping those rights of sovereignty, to which he had no title. In England, where the people do not debate in a collective body but by representation, the exercise of this sovereignty consists in the choice of representatives. The laws have therefore very strictly guarded against usurpation or abuse of this power, by many salutary provisions, which may be reduced to these three points, 1. The qualifications of the electors. 2. The qualifications of the elected. 3. The proceedings at elections.

1. As to the qualifications of the electors. The true reason of requiring any qualification, with regard to property, in voters, is to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own. If these persons had votes, they would be tempted to dispose of them under some undue influence or other. This would give a great, an artful, or a wealthy man, a larger share in elections than is consistent with general liberty. If it were probable that every man would give his vote freely and without influence of any kind, then, upon the true theory and genuine principles of liberty, every member of the community, however poor, should have a vote in electing those delegates, to whose charge is committed the disposal of his property, his liberty, and his life. But, since that can hardly be expected in persons of indigent fortunes, or such as are under the immediate dominion of others, all popular states have been obliged to establish certain qualifications; whereby some who are suspected to have no will of their own, are excluded from voting, in order to set other individuals, whose wills may be supposed independent, more thoroughly upon a level with each other.

And this constitution of suffrages is framed upon a wiser principle, with us, than either of the methods of voting, by centuries or by tribes, among the Romans. In the method by centuries, instituted by Servius Tullius, it was principally property, and not numbers, that turned the scale: in the

method by tribes, gradually introduced by the tribunes of the people, numbers only were regarded, and property entirely overlooked. Hence the laws passed by the former method had usually too great a tendency to aggrandize the patricians or rich nobles; and those by the latter had too much of a levelling principle. Our constitution steers between the two extremes. Only such are entirely excluded, as can have no will of their own: there is hardly a free agent to be found, who is not entitled to a vote in some place or other in the kingdom. Nor is comparative wealth, or property, entirely disregarded in elections; for though the richest man has only one vote at one place, yet, if his property be at all diffused, he has probably a right to vote at more places than one, and therefore has many representatives. This is the spirit of our constitution: not that I assert it is in fact quite so perfect[n] as I have here endeavoured to describe it; for, if any alteration might be wished or suggested in the present frame of parliaments, it should be in favor of a more complete representation of the people.

But to return to our qualifications; and first those of electors for knights of the shire. 1. By statute 8 Hen. VI. c. 7. and 10 Hen. VI. c. 2. (amended by (27) 14 Geo. III. c. 58.) the knights of the shire shall be chosen of people whereof every man shall have freehold to the value of forty shillings by the year within the county; which (by subsequent statutes) is to be clear of all charges and deductions, except parliamentary

n The candid and intelligent reader will apply this observation to many other parts of the work before him, wherein the constitution of our laws and government are represented as nearly approaching to perfection; without descending to the invidious task of pointing out such deviations and corruptions, as length of time and a loose state of national morals have too great a tendency to produce. The incurvations of practice are then the most notorious when compared with the rectitude of the rule; and to elucidate the clearness of the spring, conveys the strongest satire on those who have polluted or disturbed it.

(27) The 14 Geo. III. c. 58. made the residence of the electors and the elected in their respective counties, cities, and boroughs no longer necessary. It had been required from both by a statute passed in the 1 Hen. V.

and parochial taxes (28). The knights of shires are the representatives of the landholders, or landed interest of the kingdom: their electors must therefore have estates in lands or tenements, within the county represented: these estates must be freehold, that is, for term of life at least; because beneficial leases for long terms of years were not in use at the making of these statutes, and coypholders were then little better than villeins, absolutely dependent upon their lords: this freehold must be of forty shillings annual value; because that [173] sum would then, with proper industry, furnish all the necessaries of life, and render the freeholder, if he pleased, an independent man. For bishop Fleetwood, in his *chronicon preciosum*, written at the beginning of the present century, has fully proved forty shillings in the reign of Henry VI to have been equal to twelve pounds *per annum* in the reign of queen Anne; and, as the value of money is very considerably lowered since the bishop wrote, I think we may fairly conclude, from this and other circumstances, that what was equivalent to twelve pounds in his days is equivalent to twenty at present. The other less important qualifications of the electors for counties in England and Wales may be collected from the statutes cited in the margin[o]; which direct, 2. That no person under twenty-one years

o 7 and 8 W. III. c. 25. 10 Ann. c. 23. II. c. 21. 18 Geo. II. c. 18. 31 Geo. II. c. 14. 3 Geo. III. c. 24. 2 Geo.

(28) The voter's evidence of the value must be received at the poll; but it is not conclusive, and may be contradicted by other evidence, upon a scrutiny, or before a committee. The 7 & 8 W. III. c. 25. expressly declares, that public taxes are not to be deemed charges payable out of the estate; and therefore one would think that the plain and obvious construction would be, that wherever a freeholder has an estate which would yield him 40*s*. before these taxes are paid, or for which he would receive a rent of 40*s*. if he paid the taxes himself, he would have a right to vote; yet a committee has decided, that when a tenant paid a rent less than 40*s*. but paid parochial taxes, which added to the rent amounted to more than 40*s*. the landlord had no right to vote. 2 *Lud*. 475.

of age shall be capable of voting for any member. This extends to all sorts of members, as well for boroughs as counties; as does also the next, *viz.* 3. That no person convicted of perjury, or subornation of perjury, shall be capable of voting in any election. 4. That no person shall vote in right of any freehold, granted to him fraudulently to qualify him to vote. Fraudulent grants are such as contain an agreement to reconvey, or to defeat the estate granted; which agreements are made void, and the estate is absolutely vested in the person to whom it is so granted (29). And, to guard the better against such frauds, it is farther provided, 5. That every voter shall have been in the actual possession, or receipt of the profits, of his freehold to his own use for twelve calendar months before; except it came to him by descent, marriage, marriage-settlement, will, or promotion to a benefice or office. 6. That no person shall vote in respect of an annuity or rent-charge, unless registered with the clerk of the peace twelve calendar months before (30). 7. That in mortgaged or trust estates, the person in possession, under the above-mentioned restrictions, shall have the vote. 8. That only one person shall be admitted to vote for any one house or tenement, to prevent the splitting of freeholds (31). 9. That no estate shall

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Two committees have held that the interest of a mortgage is a charge, which if it reduces the value under 40*s.* takes away the vote, though there is an intermediate decision of a committee, in which the contrary was held. *Ib.* 467.

(29) And every person, who shall prepare or execute such conveyance, or who shall give his vote under it, shall forfeit 40*l.* 10 *Ann. c.* 23. *s.* 1.

(30) It must be an annuity or rent-charge issuing out of a freehold estate; and if it accrues or devolves by operation of law within a year of the election, a certificate of it must be entered with the clerk of the peace before the first day of the election. 3 *Geo. III. c.* 24. *Heyw.* 145.

(31) This is true only when a freehold estate is split and divided by the grantor in order to multiply votes and for election purposes. It would be highly unreasonable and absurd to suppose (though it has been so contended) that it extends to every case, where a person fairly and without any particular view to an election purchases a part of a

qualify a voter, unless the estate has been assessed to some land-tax aid, at least twelve months before the election (32).

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greater estate. It is part of the freeholder's oath that the estate has not been granted to him fraudulently on purpose to qualify him to give his vote. The one vote I presume was intended for the part retained by the grantor, for if the whole had been granted out thus fraudulently, no vote at all could have been given for it. See this subject treated fully in Mr. Heywood's Law of Elect. 99. It cannot, I should think, be considered a fraudulent grant under any statute, if a person should purchase an estate merely for the sake of the vote, if he buys it absolutely, and without any reservation, or secret agreement between the grantor and himself.

But it never has been supposed that this statute extends to cases which arise from operation of law, as devises, descents, &c. as if an estate should descend to any number of females, the husband of each would have a right to vote, if his interest amounted to 40*s.* a year.

A husband may vote for his wife's right of dower without an actual assignment of it by metes and bounds. 20 *Geo. III. c.* 17. *s.* 12.

But it has been determined that a member of a corporation aggregate cannot vote in right of an estate belonging to the corporation. *Heyw.* 71.

Two or more votes may be given successively for the same estate or interest at the same election; as where a freeholder votes and dies, his heir or devisee may afterwards vote at the same election. And it seems to be generally true, that where no length of possession is required by any act of parliament, the elector may be admitted to vote, though his right accrued since the commencement of the election. 1 *Doug.* 272. 2 *Lud.* 427.

(32) This is altered by 20 Geo. 3. c. 17. The estate shall be assessed to the land-tax six months before the election, either in the name of the voter or his tenant; but if he has acquired it by marriage, descent, or other operation of law, in that case it must have been assessed to the land-tax within two years before the election, either in the name of the predecessor, or person through whom the voter derives his title, or in the name of the tenant of such person.

And to remove a doubt which had arisen upon the construction of 20 Geo. III. c. 17. the 30 Geo. III. c. 35. expressly declares, that it is sufficient if either the name of the proprietor, or of the occupier, be specified in the assessment.

This requisite of assessment was intended to prevent fraud and confusion, by having a ready proof of the existence of the estate of the

10. That no tenant by copy of court roll shall be permitted to vote as a freeholder. Thus much for the electors in counties (33).

As for the electors of citizens and burgesses, these are supposed to be the mercantile part or trading interest of this kingdom. But as trade is of a fluctuating nature, and seldom long fixed in a place, it was formerly left to the crown to summon, *pro re nata*, the most flourishing towns to send representatives to parliament. So that as towns increased in trade, and grew populous, they were admitted to a share in the legislature. But the misfortune is, that the deserted boroughs continued to be summoned, as well as those to whom their trade and inhabitants were transferred; except a few which petitioned to be eased of the expense, then usual, of maintaining their members: four shillings a day being allowed for a knight of the shire, and two shillings for a citizen or burgess: which was the rate of wages established in the reign of Edward III. [p] (34) Hence the members for

[p] 4 Inst. 16.

voter, and some measure of its value; but it is itself perhaps a greater evil than it was intended to remove; for an omission or irregularity in the assessment operates as a disfranchisement. Every freeholder, who wishes to preserve the important privilege of voting, must carefully examine every year the assessment, when it is stuck upon the church door, to see that he is duly assessed; and if he is not, he may appeal to the commissioners, and he may any time afterwards apply to the clerk of the peace, and upon payment of 1*s*. may examine the duplicate returned to the sessions; but it seems that he is then too late to correct an error, unless he has previously appealed to the commissioners; but from the judgment of the commissioners an appeal lies to the next quarter sessions.

(33) By 22 Geo. III. c. 41. no person employed in managing or collecting the duties of excise, customs, stamps, salt, windows, or houses, or the revenue of the post-office, shall vote at any election, and if such person presumes to vote, he shall forfeit 100*l*. This act does not extend to freehold offices granted by letters patent.

(34) Lord Coke, in the page referred to by the learned Judge, says, that this rate of wages hath been time out of mind, and that it is ex-

boroughs now bear above a quadruple proportion to those for counties, and the number of parliament men is increased

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pressed in many records; and for example, refers to one in the 46 Ed. III. where this allowance is made to one of the knights for the county of Middlesex. But Mr. Prynne's fourth Register of Parliamentary Writs, is confined almost entirely to the investigation of this subject, and contains a very particular chronological history of the writ *de expensis militum, civium, et burgensium*, which was framed to enforce the payment of these wages. Mr. Prynne is of opinion that these wages had no other origin than that principle of natural equity and justice *qui sentit commodum, debet sentire et onus*. (p. 5.)

I shall endeavour to prove upon a future occasion, that representation at the first was nothing more than the attendance of a part of a number, who were individually bound to attend, and where the attendance of the rest was dispensed with; and as all were under the same obligation to render this service, and it was left to themselves to determine which of them should undertake it, it became equitable that all should contribute to the expense and inconvenience incurred. And what Mr. Prynne informs us is remarkable: "that the first writs of "this kind extant in our records are coëval with our king's first writs "of summons to elect and send knights, citizens, and burgesses, to "parliament, both of them being first invented, issued, and recorded "together in 49 Hen. III. before which there are no memorials nor "evidences of either of those writs in our historians or records." (p. 2.) The first writs direct the sheriff to levy from the community, *i. e.* the electors of the county, and to pay the knights, *rationabiles expensas suas in veniendo ad dictum parliamentum, ibidem morando, et exinde ad propria redeundo*. And when the writs of summons were renewed in the 23d of Ed. I. these writs issued again in the same form at the end of the parliament, and were continued in the same manner till the 16 Ed. II. when Mr. Prynne finds the "*memorable writs*," which first reduced the expenses of the representatives to a certain sum by the day, viz. 4*s*. a day for every knight, and 2*s*. for every citizen and burgess; and they specified also the number of days for which this allowance was to be made, being more or less according to the distance between the place of meeting in parliament and the member's residence. When this sum was first ascertained in the writ, the parliament was held at York, and therefore the members for Yorkshire were only allowed their wages for the number of days the parliament actually sat, being supposed to incur no expense in returning to their

since Fortescue's time, in the reign of Henry the sixth, from 300 to upwards of 500, exclusive of those for Scotland. The

respective homes; but, at the same time, the members for the distant counties had a proportionate allowance in addition. Though from this time the number of days and a certain sum are specifically expressed in the writ, yet Mr. Prynne finds a few instances after this, where the allowance is a less sum; and in one, where one of the county members had but 3*s.* a day, because he was not, in fact, a knight. But with those few exceptions, the sum and form continued with little or no variation. Mr. Prynne conjectures, with great appearance of reason, that the members at that time enjoyed the privilege of parliament only for the number of days for which they were allowed wages, that being considered a sufficient time for their return to their respective dwellings. (p. 68.) But this allowance, from its nature and origin, did not preclude any other specific engagement or contract between the member and his constituents; and the editor of Glanville's Reports has given in the preface, p. 23, the copy of a curious agreement between John Strange the member for Dunwich and his electors, in the 3 Ed. IV. 1463, in which the member covenants, "whether the parliament hold long "time or short, or whether it fortune to be prorogued, that he will take "for his wages only a cade and half a barrel of herrings, to be delivered "by Christmas."

In Scotland the representation of the shires was introduced or confirmed by the authority of the legislature, in the seventh parliament of Ja. I. *anno* 1427, and there it is at the same time expressly provided, that "the commissares sall have costage of them of ilk schire, that awe "compeirance in parliament." *Murray's Stat.*

As the peers of parliament, who sat in their own right, were not benefited by this representation, it was not reasonable that they should contribute any thing to the expenses of the knights of the shire; but by 12 Ric. II. c. 12. it was enacted, that lords and spiritual persons, who purchased lands which were contributory to the expenses of the knight, should contribute in respect of such lands.

It is said that Andrew Marvell, who was member for Hull in the parliament after the restoration, was the last person in this country that received wages from his constituents. Two shillings a day, the allowance to a burgess, was so considerable a sum in ancient times, that there are many instances where boroughs petitioned to be excused

universities were in general not empowered to send burgesses to parliament; though once, in 28 Edw. I. when a parliament was summoned to consider of the king's right to Scotland, there were issued writs which required the university of Oxford to send up four or five, and that of Cambridge two or three, of their most discreet and learned lawyers for that purpose[q]. But it was king James the first who indulged them with the permanent privilege to send constantly two of their own body; to serve for those students who, though useful members of the community, were neither concerned in the landed nor

[q] Prynne parl. writs. 1. 345.

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from sending members to parliament, representing that they were engaged in building bridges or other public works, and therefore unable to bear such an extraordinary expense. (*Pryn. on 4 Inst. 32.*) And it is somewhat remarkable, that from the 33 Ed. III. and uniformly through the five succeeding reigns, the sheriff of Lancashire returned, *non sunt aliquæ civitates seu burgi infra comitatum Lancastriæ, de quibus aliqui cives vel burgenses addictum parliamentum venire debent seu solent, nec possunt propter eorum debilitatem & paupertatem.* But from these exemptions in ancient times, and the new creations by the king's charter which commenced in the reign of Ed. IV. (who in the 17th year of his reign granted to the borough of Wenlock the right of sending one burgess to parliament,) (*Sim. 97.*) the number of the members of the house of commons perpetually varied till the 29 Car. II. who in that year granted, by his charter, to Newark, the privilege of sending representatives to parliament, which was the last time that this prerogative of the crown was exercised. (1 *Doug. El. 69.*) Since the beginning of the reign of Hen. VIII. the number of the representatives of the commons is nearly doubled; for in his first parliament the house consisted only of 298 members: it does not appear that any place has lost its right of sending representatives since that time; and 260 have since been added by act of parliament, or by the king's charter either creating new or reviving old boroughs. The legislature added 27 for Wales by 27 Hen. VIII. c. 26.; 4 for the county and city of Chester by 34 Hen. VIII. c. 13.; 4 for the county and city of Durham by 25 Car. II. c. 9.; and 45 for Scotland by the act of

the trading interest; and to protect in the legislature the rights of the republic of letters. The right of election in boroughs is various, depending entirely on the several charters, customs, and constitutions of the respective places, which has occasioned infinite disputes; though now by statute 2 Geo. II. c. 24. the right of voting for the future [175] shall be allowed according to the last determination of the house of commons concerning it (35). And by statute

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union; in all 80; and 180 have been added by charter: Hen. VIII. created or restored by charter. 4. See *Pref.* to *Glanv. Rep.*

Ed. VI.	48
Mary	21
Elizabeth	60
Ja. I.	27
Ch. I.	18
Ch. II.	2
	180
Parliament has created	80
In the first parliament of Hen. VIII.	298
In all	558 the present number.

In the first parliament of Ja. I. the members of the upper house were 78, of the lower 470. 5 *Parl. Hist.* 11.

(35) That statute was merely retrospective, or only made the last determination of the right prior to the statute conclusive, without having any influence over decisions subsequent to the 2 Geo. II. And this provision was omitted in Mr. Grenville's excellent act, so that the same question, respecting the right of election in some places, was tried over again every new parliament: but to supply this defect, it was enacted by the 28 Geo. III. c. 52. that whenever a committee shall be of opinion that the merits of a petition depend upon a question respecting the right of election, or the appointment of the returning officer, they shall require the counsel of the respective parties, to deliver a statement of the right for which they contend, and the committee shall then report to the house those statements with their judgment thereupon; and if no person petition within a twelvemonth, or within fourteen days after the commencement of the next session, to oppose

3 Geo. III. c. 15. no freeman of any city or borough (other than such as claim by birth, marriage, or servitude) shall be entitled to vote therein, unless he hath been admitted to his freedom twelve calendar months before (36).

2. NEXT, as to the qualifications of persons to be *elected* members of the house of commons. Some of these depend upon the law and custom of parliament, declared by the house of commons[r]; others upon certain statutes. And from these it appears, 1. That they must not be aliens born[s], or minors[t]. 2. That they must not be any of the twelve judges[u], because they sit in the lords' house; nor of the clergy[w], for they sit

r 4 Inst. 47, 48.
s See pag. 162.
t ibid.
u Com. Journ. 9 Nov. 1605.
w Com. Journ. 13 Oct. 1553. 8 Feb. 1620. 17 Jan. 1661.

such judgment, it is final and conclusive for ever. But if such a petition be presented, then, before the day appointed for the consideration of it, any other person, upon his petition, may be admitted to defend the judgment; and a second committee shall be appointed exactly in the same manner as the first, and the decision of that committee puts an end to all future litigation upon the point in question.

The 28 Geo. III. c. 52. requires, that the space of 40 days shall intervene between the day of presenting the petition and the day appointed for the consideration of it; and this had been construed to extend to petitions which are renewed in every subsequent sessions: the 34 Geo. III. c. 83. therefore provides, that every such renewed petition shall be presented within fourteen days after the commencement of the subsequent sessions, but that the hearing of it may be appointed on any day beyond fourteen days after it is so presented.

(36) This is called the Durham act, and it was occasioned by the corporation of Durham having, upon the eve of an election, in order to serve one of the candidates, admitted 215 honorary freemen. Some corporations have the power of admitting honorary freemen, viz. persons who, without any previous claim or pretension, are admitted to all the franchises of the corporation. The Durham act is confined to persons of that description solely. It has frequently been contended, that if honorary freemen are created for the *occasion*, that is, merely for an election purpose, it is a fraud upon the rights of elec-

in the convocation (37); nor persons attainted of treason or felony [x], for they are unfit to sit any where. 3. That sheriffs of

x Com. Journ. 21. Jan. 1680. 4 Inst. 47.

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tion; and that by the common law, as in other cases of fraud, the admission and all the consequences would be null and void; that within the year, by the statute, fraud was presumed; but that after that time, the statute left the necessity of proving it upon those who imputed it. But in the Bedford case, (2 *Doug.* 91.) the committee were clearly of opinion, that the objection of occasionality did not lie against freemen made above a year before the election.

No length of possession is required from voters in burgage-tenure boroughs. There are about twenty-nine burgage-tenure boroughs in England (1 *Doug.* 224.) In these the right of voting is annexed to some tenement, house, or spot of ground, upon which a house in ancient times has stood. Any number of these burgage-tenure estates may be purchased by one person, which, at any time before a contested election, may be conveyed to so many of his friends, who would each in consequence have a right to vote.

By the 26 Geo. III. c. 100. it is enacted, that in boroughs, where the householders or inhabitants of any description claim to elect, no person shall have a right to vote as such inhabitant, unless he has actually been resident in the borough six months previous to the day on which he tenders his vote.

(37) It was decided by a committee of the house of commons in the case of Newport in 1785, that a gentleman who had been regularly admitted to deacon's orders, was capable of being a member of that house. (See 2 *Lud.* 269.) Many of the arguments in that case may be urged with equal force for the admission and exclusion of a person in priest's orders. The chief authorities for the exclusion of the clergy are the entries in the commons' journals, referred to by the learned Judge in the notes; in the two first of which this reason is assigned, viz. that the persons returned being clerks, they have or might have a voice in the house of convocation. And lord Coke also says, (4 *Inst.* 47.) that "none of the clergy, though they be of the lowest order, are "eligible, because they are of another body, viz. of the convoca-"tion;" and he refers to the first entry in the commons' Journals. Besides these authorities, there are canons of the church which prohibit the clergy from *voluntarily relinquishing the office of a deacon or minister*, and from using themselves in the course of their lives as laymen,

counties, and mayors and bailiffs of boroughs, are not eligible in their respective jurisdictions, as being returning officers[y];

y Bro. Abr. t. parliament. 7. Com. Journ. 2. 4. 15 Jun. 17 Nov. 1685. Hal. of parl. 114. 25 June, 1604. 14 Apr. 1614. 22 Mar. 1620.

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and from *exercising secular jurisdictions*, (1 *Gibs. Cod.* 180. 184.) Mr. Wooddeson has observed that the argument from the convocation ought not to be urged against the unbeneficed clergy, as none but the beneficed clergy voted for the proctors or representatives in convocation. (1 *Woodd.* 47.)

This reason for disqualifying the inferior clergy from sitting in the house of commons, would extend to the exclusion of the bishops from the house of lords. It happens not unfrequently that a peerage descends to a clergyman in priest's orders, and it has never been supposed that this sacred character, although he should retain a benefice, would disable him from taking his seat in the upper house. And this argument is stronger when we consider that, in the origin of our parliaments, the qualifications of the members of the two houses were precisely the same, viz. land held *in capite* of the king. Until the reformation, 29 of the regular clergy, abbots and priors, who were dead in law to most other purposes, had seats in the house of lords, in consequence of the lands, which they held of the crown. In Scotland the barons and commissioners of shires sat together and constituted one estate. It would have been unaccountable if holy orders by the common law had excluded one part of that estate from parliament and not the other; but both in Scotland and Ireland the clergy were declared ineligible by statute; which affords an inference that, without the authority of an act of parliament, they would of common right have participated this privilege with other subjects. (*Wight*, 293. 1 *Ld. Mountm.* 50.) The argument drawn from the sitting in the convocation has been called a *new pretence* in the time of queen Mary, in order to expel some protestant clergy from the house. (*Hody, Conv.* 429.) There is a memorable instance in the time of Richard II. of a clergyman who signalized himself in the house of commons; he is called sir Thomas Haxey, clerk; he brought in a bill, which passed the commons, to lessen the expenses of the king, and to remove bishops and ladies from the court; for which the commons were obliged to make concessions, and to surrender the author of the bill to the king; and he was afterwards condemned by the parliament to die as a traitor, but his life was spared at the intercession of the bishops because he

but that sheriff's of one county are eligible to be knights of another[z] (38). 4. That, in strictness, all members ought to have

z 4 Inst. 48. Whitelocke of parl. ch. 99, 100, 101.

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was a clergyman. (*Rot. Parl.* 20 *R.* 2. nº 16 and 23.) The boldness of his conduct proves that he had no suspicion that his title to a seat in parliament could be questioned. With regard to the canons, they seem to have as little weight as the argument drawn from the convocation; for they prove nothing by proving too much; for these canons, if available, would also preclude the clergy from acting in the commission of the peace, a secular jurisdiction which they have long exercised. If the clergy were eligible prior to, or independent of the canons, then the validity of them may be justly questioned, even of those made antecedent to 25 Hen. VIII. (see *ante*, p. 83.) for persons who were eligible might in all cases, and may still in some, be compelled to serve in parliament against their consent (1 *Doug. El. Cases*, 284.); and no set of men ought to be allowed to disable themselves and deprive their country of their services by any laws of their own, which are not expressly confirmed by the authority of the legislature. The objection to a clergyman's eligibility does not seem to be much stronger even when he is beneficed; for, from the residence enforced by the spiritual judge, the 9th ch. of the *articuli cleri* 9 Ed. II. exempts and privileges those who are engaged in the service of the king and commonwealth; *nec debet dici tendere in prejudicium ecclesiasticæ libertatis quod pro rege et republicâ necessarium invenitur*; which lord Coke declares is worthy to be written in letters of gold (2 *Inst.* 625.). An attendance in parliament is pre-eminently *pro rege et republicâ necessarium*. With regard to the residence required by the 21 Hen. VIII. c. 13. I conceive that important rights and franchises are not lost or destroyed merely because they become in some degree inconsistent with the provisions of a new statute, which is entirely silent respecting them; if that were the case, the beneficed clergy have also lost their capacity to sit in the convocation; for though the statute makes exception in some cases of absence, as upon pilgrimages and the king's service abroad, yet there is no exception for attendance upon the convocation. But even when the clergy were permitted to tax themselves in convocation, that circumstance was very inadequate to debar them from electing or being elected to parliament. Taxation is certainly an important branch of legislation; yet it is far from the whole concern of that power which superintends and

been inhabitants of the places for which they are chosen[a]: but this, having been long disregarded, was at length entirely

a Stat. 1 Hen. V. c. 1. 23 Hen. VI. c. 15.

protects our lives, liberty, and property. When the clergy ceased to tax themselves, the reason for their sharing in the rights and privileges of representation was strengthened but not created. After the clergy granted the last subsidy in convocation in 1663, and were afterwards taxed in parliament, as if this alone had precluded them from a share of parliamentary representation, they tendered their votes in right of their glebes at county elections, which have ever since been received with tacit approbation. But the capacity to elect and to be elected being originally the same, when you take away an obstruction from the one, you remove it also from the other, unless some express law has superinduced a farther impediment: but I apprehend that the reason that the clergy, having no other lands than their glebes, never voted nor were elected in ancient times, did not in any degree depend either upon taxation or the convocation; but that it was owing solely to the tenure of their glebe land, viz. frankalmoign, which exempted them from attendance on the courts of the king, lords, and sheriffs (2 *Bl.* 101.); and even if they held other lands, holy orders exempted them by the common law from secular services and temporal offices; and this was confirmed by magna charta and the statute of Marlbridge. (2 *Inst.* 3 and 121.) This was an exemption, and not an exclusion; but what are now important rights, were originally considered duties and burdens: it is not therefore strange, that the clergy should avail themselves of this privilege till the disuser became regarded as an incapacity. Their glebe lands are, no doubt, freeholds under the 8 Hen. VI. c. 7.; and when they were admitted to vote for representatives in right of these freeholds, it followed as a consequence, that they were also eligible to represent, unless some better authority can be produced for their exclusion than merely disuse, or their having a voice in the convocation, where they no longer tax themselves, or their being prohibited by canons, which in other instances are disregarded, and which probably could never be thought to be obligatory upon the parliament.

This was the note in the two preceding editions; but since the publication of the last, Mr. John Horne Tooke, a gentleman, who had taken priest's orders early in life, but who had long ceased to officiate, or even to appear, as a clergyman, was returned for Old

repealed by statute 14 Geo. III. c. 58. 5. That no persons concerned in the management of any duties or taxes created

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Sarum. No petition being presented within the time limited by Grenville's act, one of the members moved that a committee might be appointed to search for precedents respecting the eligibility of the clergy into the house of commons.

The committee afterwards reported, that there are few instances with particular additions till the 8 Hen. IV, for then the practice of returning citizens and burgesses by indentures annexed to the writ first prevailed, yet they find five with the addition of *clericus*. The committee state also, that no such name as Sir Thomas Haxey exists in the returns of 20 Ric. II. which are perfect and extant in the Tower and they state the instances referred to above by the learned Judge.

It appears from the rolls of parliament cited in this note, that the king demanded, *Le noun de cellui, qui bailla ae ditz communes la dite bille.* But it certainly appears by the following record in *Rymer's Fœdera*, tom. vii. p. 844, that he was not a member of the house of commons, but the proxy of the earl of Nottingham in the house of lords; at that time, commoners might act as the proxies of peers. *Thomas comes Marescallus et Nottinghamiæ, Capitaneus villæ regis Calesii, qui in obsequio regis in partibus Picardiæ super salvâ custodiâ ejusdem villæ moratur, habet literas regis de generali attornatu, sub nominibus Willielmi Bagot. chevalier, et Thomæ Haxey clerici, per unum annum duraturas.*

Teste rege apud Calesium tertio die Octobris. Cancellarius recepit attornatum.

Although from this record it certainly appears that Haxey was not a member of the house of commons, yet his case furnishes this observation, *viz.* that if any prohibition in the canon law would have prevented him from being a representative of a county or a borough in the house of commons, the same prohibition would have prevented him from exercising the lay functions of a temporal peer in the house of lords.

When the question of the eligibility of the clergy was discussed in the house of commons, it was proposed by the prime minister, that a bill should be brought in to declare the clergy ineligible, and by that means to remove all doubts and questions in future. But still the debate was continued in both houses, whether this statute would be declaratory of what was the law, or introductory of a new law. Those who maintained the ineligibility of the clergy drew their arguments chiefly from the canon law; the opposite party, particularly Lord Thur-

since 1692, except the commissioners of the treasury[b], nor any of the officers following[c], (*viz.* commissioners of prizes, transports, sick and wounded, wine licenses, navy, and victualling; secretaries or receivers of prizes; comptrollers of the army accounts; agents for regiments; governors of plantations and their deputies; officers of Minorca or Gibraltar; officers of the excise and customs; clerks or deputies in the several offices of the treasury, exchequer, navy, victualling, admiralty, pay of the army or navy, secretaries of state, salt,

b Stat. 5 and 6 W. and M. c. 7. W. III. c. 10. 6 Ann. c. 7. 15 Geo. II. c. 28.
c Stat. 11 and 12 W. III. c. 2. 12 and 13

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low, adopted most of the arguments in this note: sanctioned by the approbation of that learned and venerable peer, the Editor with proud satisfaction re-annexes it to the works of Sir William Blackstone.

But the most strenuous advocates for the admissibility of the clergy by the common law, will not necessarily object to their exclusion by an act of the legislature. They were so excluded from the parliaments of Scotland and Ireland. And perhaps it may be justly observed, that sound policy and the most important interests of society require, that the ambition of a clergyman should be confined to his own profession, and that piety and learning should be his surest recommendations to advancement.

By the 41 Geo. III. c. 73, entitled, an act to remove doubts respecting the eligibility of persons in holy orders to sit in the house of commons, it was declared and enacted, that no person having been ordained to the office of priest or deacon, is or shall be capable of being elected to serve in parliament as a member of the house of commons; and if any such person shall sit in the house, he shall forfeit 500*l.* a day, and be incapable of holding any preferment or office under his Majesty. But the statute was not to extend to the members of the house during that parliament.

(38) Two decisions of committees are agreeable to what is advanced in the text. In the first it was determined, that the sheriff of Berkshire could not be elected for Abingdon, a borough within that county (1 *Doug.* 419.): in the second, that the sheriff of Hampshire could be elected for the town of Southampton within that county, because Southampton is a county of itself, and is as independent of Hampshire as of any other county. 4 *Doug.* 87.

stamps, appeals, wine licenses, hackney coaches, hawkers and pedlars,) nor any persons that hold any new office under the crown created since 1705 [d], are capable of being elected or sitting as members (39). 6. That no person having a pension under the crown during pleasure, or for any term of years, is capable of being elected or sitting [e]. 7. That if any member accepts an office under the crown, except an officer in the army or navy accepting a new commission, his seat is void; but such member is capable of being re-elected [f]. 8. That all knights of the shires shall be actual knights, or such notable esquires

d Stat. 6 Ann. c. 7. e Stat. 6 Ann. c. 7. 1 Geo. c. 56. f Stat. 6 Ann. c. 7.

(39) All the persons enumerated above are utterly incapable of sitting in the house of commons, whilst they continue in their respective situations; and amongst these are all persons who accept from the crown any office created since 1705. But by the 26th section of the same act, 6 Ann. c. 7. if any member shall accept of any office of profit from the crown, his election or seat becomes void, but he may be re-elected. This means an office of profit, which was in existence prior to 1705.

The office or trust of a member of parliament cannot be resigned, and every member is compellable to discharge the duties of it, unless he can shew such a cause, as the house in its discretion will think a sufficient excuse for his non-attendance upon a call of the house. The only way therefore of vacating a seat, is by accepting a situation, in consequence of which the law declares his seat vacant. So where members wish to vacate their seats and retire from parliament, it is now usual for the crown to grant them the office of the stewardship of the Chiltern Hundreds. Mr. Hatsell observes, that "the practice of "accepting this nominal office, which began, he believes, only about "the year 1750, has been now so long acquiesced in from its conve-"nience to all parties, that it would be ridiculous to state any doubt "about the legality of its proceedings; otherwise (he believes) it "would be found very difficult, from the form of these appointments, "to shew that it is an office of profit under the crown." (2 *Hats.* 41.) But Mr. Hatsell himself raises a doubt, which I do not think he removes; for surely no usage since 1750, or no usage whatever, can countervail the clear and express words of an act of parliament.

and gentlemen as have estates sufficient to be knights (40), and by no means of the degree of yeomens. This is reduced to a still greater certainty, by ordaining, 9. That every knight of a shire shall have a clear estate of freehold or copyhold (41) to the value of six hundred pounds *per annum*, and every citizen and burgess to the value of three hundred pounds: except the eldest sons of peers, and of persons qualified to be knights of shires, and except the members for the two universities[h]; which somewhat balances the ascendant which the boroughs have gained over the counties, by obliging the trading interest to make choice of landed men: and of this qualification the member must make oath, and give in the particulars in writing, at the time of his taking his seat[i] (42). But, subject to these standing restrictions and disqualifications, every subject of the realm is eligible of common right: though there are instances, wherein persons in particular circumstances have forfeited that common right, and have been declared ineligible *for that parliament* by a vote of the house of

g Stat. 23 Hen. VI. c. 15. h Stat. 9 Ann. c. 5. i Stat. 33 Geo. II. c. 20.

(40) This, by the statute *de militibus*, 1 Ed. II. was 20*l.* a year, and put in force against those who had 40*l.* a year till 16 Car. I. c. 16. See p. 404.

(41) Or mortgage, if the mortgagee has been seven years in possession.

(42) By 22 Geo. III. c. 45. no contractor with the officers of government, or with any other person for the service of the public, shall be capable of being elected, or of sitting in the house, as long as he holds any such contract, or derives any benefit from it. But this does not extend to contracts with corporations, or with companies, which then consisted of ten partners, or to any person to whom the interest of such a contract shall accrue by marriage or operation of law for the first twelve months. And if any person disqualified by such a contract shall sit in the house, he shall forfeit 500*l.* for every day; and if any person who engages in a contract with government, admits any member of parliament to a share of it, he shall forfeit 500*l.* to the prosecutor.

commons[j], or *for ever* by an act of the legislature[k]. But it was an unconstitutional prohibition which was grounded on an ordinance of the house of *lords*[l], and inserted in the *king's* writs, for the parliament holden at Coventry, 6 Hen. IV, that no apprentice or other man of the law should [177] be elected a knight of the shire therein[m]; in return for which, our law books and historians[n] have branded this parliament with the name of *parliamentum indoctum*, or the lack-learning parliament; and sir Edward Coke observes with some spleen[o], that there never was a good law made thereat.

3. The third point, regarding elections, is the method of proceeding therein. This is also regulated by the law of parliament, and the several statutes referred to in the margin[p]; all which I shall blend together, and extract out of them a summary account of the method of proceeding to elections.

As soon as the parliament is summoned, the lord chancellor (or if a vacancy happens during the sitting of parliament, the speaker, by order of the house; and without such order, if a vacancy happens by death, or the member's becoming a peer (44), in the time of a recess for upwards of twenty days)

j See page 163.
k Stat. 7 Geo. I. c. 28.
l 4 Inst. 10. 48. Pryn. Plea for lords. 379. 2 Whitelocke, 359. 368.
m Pryn. on 4 Inst. 13.
n Walsingh. A. D. 1405.
o 4 Inst. 48.
p 7 Hen. IV. c. 15. 8 Hen. VI. c. 7. 23 Hen. VI. c. 14. 1 W. and M. st. 1. c. 2. 2 W. and M. st. 1. c. 7. 5 and 6 W. and M. c. 20. 7 W. III. c. 4. 7 and 8 W. III. c. 7. and c. 25. 10 and 11 W. III. c. 7. 12 and 13 W. III. c. 10. 6 Ann. c. 23. 9 Ann. c. 5. 10 Ann. c. 19. and c. 33. 2 Geo. II. c. 24. 8 Geo. II. c. 30. 18 Geo. II. c. 18. 19 Geo. II. c. 28. 10 Geo. III. c. 16. 11 Geo. III. c. 42. 14 Geo. III. c. 15. 15 Geo. III. c. 36. 28 Geo. III. c. 52.

(44) With regard to a vacancy by death or a peerage during a recess, the 24 Geo. III. s. 2. c. 26. which repeals the former statutes upon this subject, provides, that if during any recess any two members give notice to the speaker by a certificate under their hands, that there is a vacancy by death, or that a writ of summons has issued under the great seal to call up any member to the house of lords, the speaker shall forthwith give notice of it to be inserted in the Gazette; and at the end of fourteen days after such insertion, he shall issue his warrant to the clerk of the crown, commanding him to make out a new

sends his warrant to the clerk of the crown in chancery; who thereupon issues out writs to the sheriff of every county, for the election of all the members to serve for that county, and every city and borough therein. Within three days (45) after the receipt of this writ, the sheriff is to send his precept, under his seal, to the proper returning officers of the cities and boroughs, commanding them to elect their members: and the said returning officers are to proceed to election within eight days from the receipt of the precept, giving four days notice of the same[q]; and to return the persons chosen, together with the precept, to the sheriff.

But elections of knights of the shire must be proceeded to by the sheriffs themselves in person, at the next county court that shall happen after the delivery of the writ. The county court is a court held every month or oftener by the sheriff, intended to try little causes not exceeding the value of forty shillings, in what part of the county he pleases to appoint for that purpose: but for the election of

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q In the borough of New Shoreham in Sussex, wherein certain freeholders of the county are entitled to vote by statute 11 Geo. III. c. 55. the election must be within *twelve* days, with *eight* days notice of the same.

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writ for the election of another member. But this shall not extend to any case where there is a petition depending concerning such vacant seat, or where the writ for the election of the member so vacating had not been returned fifteen days before the end of the last sitting of the house, or where the new writ cannot issue before the next meeting of the house for the despatch of business. And to prevent any impediment in the execution of this act by the speaker's absence from the kingdom, or by the vacancy of his seat, at the beginning of every parliament he shall appoint any number of members from three to seven inclusive, and shall publish the appointment in the Gazette. These members, in the absence of the speaker, shall have the same authority as is given to him by this statute. These are the only cases provided for by act of parliament; so for any other species of vacancy no writ can issue during a recess.

(45) The officer of the cinque ports has six days by 10 and 11 W. III. c. 7.

knights of the shire it must be held at the most usual place. If the county court falls upon the day of delivering the writ, or within six days after, the sheriff may adjourn the court and election to some other convenient time, not longer than sixteen days, nor shorter than ten; but he cannot alter the place, without the consent of all the candidates: and, in all such cases, ten days public notice must be given of the time and place of the election (46).

And, as it is essential to the very being of parliament, that elections should be absolutely free, therefore all undue influences upon the electors are illegal and strongly prohibited (47).

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(46) This is altered by 25 Geo. III. c. 84. which enacts, that in every county, the sheriff having indorsed on the back of the writ the day on which he receives it, shall, within two days after the receipt thereof, cause proclamation to be made at the place where the ensuing election ought by law to be held, of a special county court to be there held, for the purpose of such election only, on any day, Sunday excepted, not later from the day of making such proclamation than the 16th day, nor sooner than the 10th; and that he shall proceed in such election at such special county court in the same manner as if the said election had been held at a county court, or at an adjourned county court, according to the former laws. And by the 33 Geo. III. c. 64. the proclamation must be made at the usual place between the hours of eight o'clock in the morning and four in the afternoon, from the 25th of October to the 25th of March; and in the rest of the year between eight in the morning and six in the afternoon.

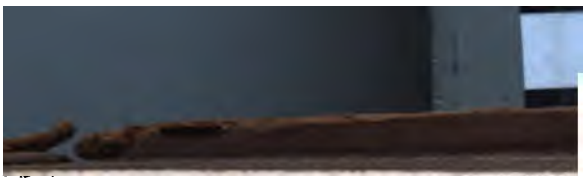
(47) In support of this principle the 3 Ed. I. c. 5. is generally cited: *Et pur ceo que elections deivent estres franches, le roi defende sur sa greve forfaiture, que nul haut homme n'autre per poiar des armes, ne per menaces, ne disturbe de faire franche election.* The principle is good, and ought to be applied to all elections; but the elections which the legislature had then in contemplation, were those of the sheriff, coroner, &c. for the house of commons, and of course elections of its members had not then existence. And as it would be repugnant to this principle and to sound policy, it is decided, that a wager between two electors upon the success of their respective candidates is illegal and void. For, if it were permitted, it would manifestly corrupt the freedom of elections. 1 *T. R.* 55.

For Mr. Locke[r] ranks it among those breaches of trust in the executive magistrate, which according to his notions amount to a dissolution of the government, "if he employs the force, "treasure, and offices of the society to corrupt the represen- "tatives, or openly to pre-engage the electors, and prescribe "what manner of persons shall be chosen. For thus to re- "gulate candidates and electors, and new-model the ways of "election, what is it, says he, but to cut up the government "by the roots, and poison the very fountain of public secu- "rity?" As soon therefore as the time and place of election, either in counties or boroughs, are fixed, all soldiers quartered in the place are to remove, at least one day before the election, to the distance of two miles or more; and not to return till one day after the poll is ended. Riots likewise have been frequently determined to make an election void. By vote also of the house of commons, to whom alone belongs the power of determining contested elections, no lord of parliament, or lord lieutenant of a county, hath any right to interfere in the election of commoners; and, by statute, the lord warden of the cinque ports shall not recommend any [179] members there. If any officer of the excise, customs, stamps, or certain other branches of the revenue, presume to intermeddle in elections, by persuading any voter, or dissuading him, he forfeits 100*l.* and is disabled to hold any office.

THUS are the electors of one branch of the legislature secured from any undue influence from either of the other two, and from all external violence and compulsion. But the greatest danger is that in which themselves co-operate, by the infamous practice of bribery and corruption. To prevent which it is enacted, that no candidate shall, after the date (usually called the *teste*) of the writs (48), or after the

r On Gov. p. 2. sec. 222.

(48) Or after the ordering of the writs: that is, after the signing of the warrant to the chancellor for issuing the writs. *Sim.* 165.



vacancy, give any money or entertainment to his electors, or promise to give any, either to particular persons, or to the place in general, in order to his being elected: on pain of being incapable to serve for that place in parliament (49).

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(49) This incapacity arises from the 7 W. III. c. 4. commonly called the Treating Act, which enacts, that the candidate offending against that statute *shall be disabled and incapacitated upon such election.* The obvious meaning of these words and of the rest of the statute is, that treating vacates that election only, and that the candidate is no way disqualified from being re-elected, and sitting upon a second return. See the second case of Norwich 1787, 3 *Lud.* 455. Though the contrary was determined in the case of Honiton, 1782, *ib.* 162.

But after the general election in 1796, the return of one of the members for the borough of Southwark was declared void by a committee, because it was proved that he had treated during the election. Upon that vacancy he offered himself again a candidate, and having a majority of votes was returned as duly elected; but upon the petition of the other candidate, the next committee determined that the sitting member was ineligible, and that the petitioner ought to have been returned. And he took his seat accordingly.

It has been supposed, that the payment of travelling expenses, and a compensation for loss of time, were not treating or bribery within this or any other statute; and a bill passed the house of commons to subject such cases to the penalties imposed by 2 Geo. II. c. 24. upon persons guilty of bribery. But this bill was rejected in the house of lords by the opposition of lord Mansfield, who strenuously maintained that the bill was superfluous; that such conduct, by the laws in being, was clearly illegal, and subject, in a court of law, to the penalties of bribery (2 *Lud.* 67.). Indeed it is so repugnant both to the letter and spirit of these statutes, that it is surprising that such a notion and practice should ever have prevailed. It is certainly to be regretted, that any elector should be prevented by his poverty from exercising a valuable privilege; but it probably would be a much greater injury to the country at large if it were deprived of the services of all gentlemen of moderate fortune, by the legalizing of such a practice, even with the most equitable restrictions, not to mention the door that it might open to the grossest impurity and corruption.

If an inn-keeper furnishes provisions to the voters, contrary to the 7 W. 3. c. 4. though at the express request or order of one of the can-

And if any money, gift, office, employment, or reward be given or promised to be given to any voter, at any time, in order to influence him to give or withhold his vote, as well he that takes as he that offers such bribe forfeits 500*l.* and is for ever disabled from voting and holding any office in any corporation; unless, before conviction, he will discover some other offender of the same kind, and then he is indemnified for his own offence[s] (50) the first instance that occurs, of election bribery, was so early as 13 Eliz. when one Thomas

[s] In like manner the Julian law *de ambitu* inflicted fines and infamy upon all who were guilty of corruption at elections; but, if the person guilty convicted another offender, he was restored to his credit again. Ff. 48. 14. 1.

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didates, he cannot afterwards maintain an action against that candidate, as courts of justice will not enforce the performance of a contract made in direct violation of the general law of the country. 1 *Bos.* and *Pull.* 264.

(50) This is enacted by 2 Geo. II. c. 24. explained and enlarged by 9 Geo. II. c. 38. and 16 Geo. II. c. 11. but these statutes do not create any incapacity of sitting in the house, that depends solely upon the treating act mentioned in the preceding note.

It has been held that it is bribery if a candidate gives an elector money to vote for him, though he afterwards votes for another (3 *Burr.* 1235.): and there can be no doubt, but it would also be bribery in the voter, for the words of the statute clearly make the offence mutual. And it has been decided that such vote will not be available to the person to whom it may afterwards be given gratuitously; for the elector swears he has received no money, gift, or reward, in order to give his vote; and an election ought not to depend upon a vote so contaminated with perjury, bribery, and treachery; and the voter's previous conduct must raise a strong suspicion that he gives his vote rather from the inducement of a higher bribe, than from the conviction of his conscience. But the propriety of this decision has been questioned by respectable authority. (2 *Doug.* 416.) An instance is given in 4 *Doug.* 366. of an action, in which twenty-two penalties, 11,000*l.* were recovered against one defendant. But besides the penalties imposed by the legislature, bribery is a crime at common law, and punishable by indictment or information, though the court of king's bench will not in ordinary cases grant an information within two years, the time within which

Longe (being a simple man and of small capacity to serve in parliament) acknowledged that he had given the returning officer and others of the borough for which he was chosen four pounds to be returned member, and was for that premium elected. But for this offence the borough was amerced (51), the member was removed, and the officer fined and imprisoned[t]. But, as this practice hath since taken much deeper and more universal root, it hath occasioned the making of these wholesome statutes; to complete the efficacy of which, there is nothing wanting but resolution and integrity to put them in strict execution.

UNDUE influence being thus (I wish the depravity [180] of mankind would permit me to say, effectually) guarded against, the election is to be proceeded to on the day appointed; the sheriff or other returning officer first taking an oath against bribery, and for the due execution of his office. The candidates likewise, if required (52), must swear to their qualification; and the electors in counties to theirs; and the electors both in counties and boroughs are also com-

t 4 Inst. 23. Hale of parl. 112. Com. Journ. 10 and 11 May 1571.

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an action may be brought for the penalties under the statute. (3 *Burr.* 1335. 1359.) But this rule does not affect a prosecution by an indictment, or by an information by the attorney-general, who in one case was ordered by the house to prosecute two gentlemen who had procured themselves to be returned by bribery; they were convicted and sentenced by the court of king's bench to pay each a fine of 1000 marks, and to be imprisoned six months. 4 *Doug.* 292.

(51) Lord Mansfield observed upon this, that there could be no fine set in the house of commons; it must have been in the starchamber (3 *Burr.* 1336.); but the journals of the commons on the day referred to by the learned Judge expressly state, that it is ordered by this house that a fine of 20 pounds be assessed upon the corporation for their said lewd and slanderous attempt.

(52) If any candidate, upon a reasonable request from another candidate, or by two of the electors either at the election, or at any time before the return of the writ, shall refuse to swear to his qualification, his election shall be void. (9 *Ann.* c. 5.)

pellable to take the oath of abjuration and that against bribery and corruption. And it might not be amiss, if the members elected were bound to take the latter oath, as well as the former; which in all probability would be much more effectual, than administering it only to the electors (53).

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(53) All electors are compellable before they vote to take the oaths of allegiance and supremacy, 7 & 8 W. III. c. 27. But as these oaths were frequently required from the electors by one of the candidates for the purpose of delay, it was enacted by the 34 Geo. III. c. 73. that, when a poll is demanded at any election, the returning officer may, at the request of any candidate, appoint two persons, (or a sufficient number,) at proper places, to administer the oaths of allegiance and supremacy, the declaration of fidelity, the oath of abjuration, and the declaration or affirmation of the effect thereof, to each elector before he tenders his vote. The 42 Geo. III. c. 62. empowers these persons to administer all the oaths, and to take all the affirmations in the case of quakers, required by any law or statute, and to certify the names of the electors who have taken such oaths or made such affirmations. The expense thereby incurred is to be borne equally by all the candidates. And by the 25 Geo. III. c. 84. all electors for cities and boroughs shall swear to their name, addition, or profession, and place of abode; and also, like freeholders in counties, that they believe they are of the age of 21, and that they have not been polled before at that election. And by the same statute it is enacted, that if a poll is demanded at any election for any county or place in England or Wales, it shall commence either that day, or at the farthest upon the next, and shall be continued from day to day (Sundays excepted) until it be finished; and it shall be kept open seven hours at the least each day, between eight in the morning and eight at night; but if it should be continued till the 15th day, then the returning officer shall close the poll at or before three in the afternoon, and shall immediately, or on the next day, publicly declare the names of the persons who have a majority of votes; and he shall forthwith make a return accordingly, unless a scrutiny is demanded by any candidate, or by two or more of the electors, and he shall deem it necessary to grant the same, in which case it shall be lawful for him to proceed thereupon; but so as that, in all cases of a general election, if he has the return of the writ, he shall cause a return of the members to be filed in the crown office on or before the day on which the writ is returnable. If he is a returning officer acting under a precept, he shall make a return of the members at least six days before the day of the

THE election being closed, the returning officer in boroughs returns his precept to the sheriff, with the persons elected by the majority: and the sheriff returns the whole, together with the writ for the county and the knights elected thereupon, to the clerk of the crown in chancery; before the day of meeting, if it be a new parliament, or within fourteen days after the election, if it be an occasional vacancy; and this under penalty of 500*l*. If the sheriff does not return such knights only as are duly elected, he forfeits, by the old statutes of Henry VI, 100*l*; and the returning officer in boroughs for a like false return 40*l*; and they are besides liable to an action, in which double damages shall be recovered, by the later statutes of king William: and any person bribing the returning officer shall also forfeit 300*l*. But the members returned by him are the sitting members, until the house of commons, upon petition, shall adjudge the return to be false and illegal. The form and manner of proceeding upon such petition are now regulated by statute (54) 10 Geo. III. c. 16.) amended

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return of the writ; but if it is not a general election, then, in case of a scrutiny, a return of the member shall be made within 30 days after the close of the poll. Upon a scrutiny, the returning officer cannot compel any witness to be sworn, though the statute gives him power to administer an oath to those who *consent* to take it.

(54) This statute is better known by the name of Grenville's act, and it has justly conferred immortal honor upon its author. The select committees appointed pursuant to this statute, have examined and decided the important rights of election with a degree of purity and judicial discrimination highly honorable to themselves; and which were still more satisfactory to the public, from the recollection of the very different manner in which these questions, prior to 1770, had been treated by the house at large.

But this act has been much improved by 25 Geo. III. c. 84. & 28 Geo. III. c. 52. By these statutes any person may present a petition complaining of an undue election; but one subscriber of the petition must enter into a recognizance, himself in 200*l*. with two sureties in 100*l*. each, to appear and support his petition; and then the house shall appoint some day beyond 14 days after the commencement of the ses-

by 11 Geo. III. c. 42. and made perpetual by 14 Geo. III. c. 15.) which directs the method of choosing by lot a select

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sion, or the return of the writ, and shall give notice to the petitioners and the sitting members to attend the bar of the house on that day by themselves, their counsel or agents; this day, however, may be altered, but notice shall be given of the new day appointed. On the day fixed, if 100 members do not attend, the house shall adjourn from day to day, except over Sundays, and for any number of days over Christmasday, Whitsunday, and Good Friday; and when 100 or more members are present, the house shall proceed to no other business except swearing in members, receiving reports from committees, amending a return, or attending his majesty or commissioners in the house of lords. And by the 32 Geo. III. c. 1. the house is enabled to receive a message from the lords, and to proceed to any business that may be necessary for the prosecution of an impeachment on the days appointed for the trial. Then the names of all the members belonging to the house are put into six boxes or glasses in equal numbers, and the clerk shall draw a name from each of the glasses in rotation, which name shall be read by the speaker, and if the person is present, and not disqualified, it is put down; and in this manner they proceed, till forty-nine such names are collected. But besides these forty-nine, each party shall select, out of the whole number present, one person, who shall be the nominee of that party. Members who have voted at that election, or who are petitioners, or are petitioned against, cannot serve; and persons who are sixty years of age, or who have served before, are excused if they require it; and others who can shew any material reason, may also be excused by the indulgence of the house. After 49 names are so drawn, lists of them shall be given to the respective parties, who shall withdraw, and shall alternately strike off one (the petitioners beginning) till they are reduced to 13; and these 13, with the two nominees, constitute the select committee. If there are three parties they shall alternately strike off one; and in that case the 13 shall choose the two nominees.

The members of the committee shall then be ordered by the house to meet within 24 hours, and they cannot adjourn for more than 24 hours, except over Sunday, Christmasday, and Good Friday, without leave of the house; and no member of the committee shall absent himself without the permission of the house. The committee shall not in any case proceed to business with fewer than 13 members; and they are dissolved if for three successive days of sitting their number is less than that, unless they have sat 14 days, and then they may proceed

committee of fifteen members, who are sworn well and truly to try the same, and a true judgment to give according to the evidence. And this abstract of the proceedings at elections of knights, citizens, and burgesses, con- [181] cludes our inquiries into the laws and customs more peculiarly relative to the house of commons.

VI. I PROCEED now, sixthly, to the method of making laws; which is much the same in both houses: and I shall touch it very briefly, beginning in the house of commons. But first I must premise, that for despatch of business each house of parliament has its speaker. The speaker of the house of lords, whose office is to preside there, and manage the formality of business, is the lord chancellor, or keeper of the king's great seal, or any other appointed by the king's commission: and, if none be so appointed, the house of lords (it is said may

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though reduced to 12; and if 25 days, to 11; and they continue to sit notwithstanding a prorogation of the parliament. All the fifteen members of the committee take a solemn oath in the house, that they will give a true judgment according to the evidence, and every question is determined by a majority.

The committee may send for witnesses and examine them upon oath, a power which the house of commons does not possess; and if they report that the petition or defence is frivolous or vexatious, the party aggrieved shall recover costs. For their mode of reporting the right of election, see note (35), p. 174.

By the 11 Geo. III. c. 42. if 100 or more members are present, but if upon the drawing by lot 49 not set aside nor excused cannot be completed, the house shall then adjourn, as if 100 had not attended. And to prevent the public business being delayed by the want of a sufficient attendance to form a select committee, the 36 Geo. III. c. 59. has provided, that when a sufficient number of members are not present for that purpose, the house, before they adjourn, may proceed to the order for the call of the house, if it has been previously fixed for that day, or they may adjourn such call, or they may order it to be called on any future day, and may make such orders relative thereto as they think fit for enforcing a sufficient attendance of the members.

These are the principal provisions of this excellent statute under its present improved state.

elect (55). The speaker of the house of commons is chosen by the house (56); but must be approved by the king (57).

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(55) Such an instance in the Irish house of lords is mentioned by lord Mountmorres, 2 Vol. 108.

(56) Mr. Hume is mistaken, who says that Peter de la Mere, chosen in the first parliament of Ric. II. was the first speaker of the commons, (3 Vol. 3.); for we find in the rolls of parliament, (51 Ed. III. nº 87.) that sir Thomas Hungerford, *chivalier, qui avoit les parolles des communes en cest parlement*, addressed the king in the name of the commons, in that jubilee year, to pray that he would pardon several persons who had been convicted in impeachments.

By the 30 Geo. III. c. 10. the salary of the speaker of the house of commons, including his fees and former allowances, is fixed at the clear yearly sum of 6000*l*. And by the same statute he is disqualified from holding any office of profit under the crown during pleasure.

(57) Sir Edward Coke, upon being elected speaker in 1592, in his address to the throne, declared, "this is only as yet a nomination, and "no election, until your majesty giveth allowance and approbation." (2 *Hats.* 154.) But the house of commons at present would scarce admit their speaker to hold such language. Till sir Fletcher Norton was elected speaker, 29th Nov. 1774, every gentleman who was proposed to fill that honorable office, affected great modesty, and if elected, was almost forced into the chair, and at the same time he requested permission to plead, in another place, his excuses and inability to dicharge the office, which he used to do upon being presented to the king. But sir Fletcher Norton was the first who disregarded this ceremony both in the one house and in the other. His successors, Mr. Cornewall and Mr. Addington, requested to make excuses to the throne, but were refused by the house, though Mr. Addington, in the beginning of the present parliament, 26th Nov. 1790, followed the example of sir Fletcher Norton, and intimated no wish to be excused. (See 1 *Woodd.* 59.) Sir John Cust was the last speaker who addressed the throne in the language of diffidence, of which the following sentence may serve as a specimen: "I can now be an humble suitor to "your majesty, that you would give your faithful commons an opportu- "nity of rectifying this the only inadvertent step which they can ever "take, and be graciously pleased to direct them to present some other "to your majesty, whom they may not hereafter be sorry to have "chosen, nor your majesty to have approved." (6 Nov. 1761.) The chancellor used to reply in a handsome speech of compliment and

And herein the usage of the two houses differs, that the speaker of the house of commons cannot give his opinion or argue any question in the house; but the speaker of the house of lords, if a lord of parliament, may. In each house the act of the majority (58) binds the whole; and this ma-

encouragement; but now he shortly informs the commons that his majesty approves of their speaker, who claims the ancient privileges of the commons, and then they return to their own house.

Some speakers upon this occasion have acquire dgreat honor and distinction, particularly Thomas Nevile, *germanus frater domini Burgavenny, qui electus prolocutor per communes sacræ regiæ majestati est præsentatus, et ita egregiè, eleganter, prudenter, et disertè in negotio sibi commisso se gessit, ut omnium præsentium plausu et lætitiâ, maximam sibi laudem comparavit, cujus laudi sacra regia majestas non modicum eximium honoris cumulum adjecit, nam præsentibus et videntibus dominis spiritualibus et temporalibus et regni communibus eum equitis aurati honore et dignitate ad laudem Dei et sancti Georgii insignivit, quod nemini mortalium per ulla ante sæcula contigisse audivimus.* 6 Hen. VIII. 1 Lords' Journ. 20.

(58) In the house of commons the speaker never votes but when there is an equality without his casting vote, which in that case creates a majority; but the speaker of the house of lords has no casting vote, but his vote is counted with the rest of the house; and in the case of an equality, the non-contents or negative voices have the same effect and operation as if they were in fact a majority. (Lords' Journ. 25 June, 1661.) Lord Mountmorres says, that the house of lords in Ireland observes the same rule: and that in cases of equality, *semper præsumitur pro negante.* (1 Vol. 105.) Hence the order in putting the question in appeals and writs of error is this, "Is it your lordships' "pleasure that this decree or judgment shall be reversed?" for if the votes are equal, the judgment of the court below is affirmed. (*Ib.* 2 Vol. 81.) Here it may not be improper to observe that there is no casting voice in courts of justice; but in the superior courts, if the judges are equally divided, there is no decision, and the cause is continued in court till a majority concur. At the sessions the justices, in case of equality, ought to respite the matter till the next sessions: but if they are equal one day, and the matter is duly brought before them on another day in the same sessions, and if there is then an inequality, it will amount to a judgment; for all the time of the sessions is considered but as one day. A casting vote sometimes signifies the single vote of a person, who never votes but in the case of an equality; some-

jority is declared by votes openly and publicly given: not as at Venice, and many other senatorial assemblies, privately or by ballot. This latter method may be serviceable, to prevent intrigues and unconstitutional combinations: but is impossible to be practised with us; at least in the house of commons, where every member's conduct is subject to the future censure of his constituents, and therefore should be openly submitted to their inspection.

To bring a bill into the house, if the relief sought by it is of a private nature, it is first necessary to prefer a petition; which must be presented by a member, and usually sets forth the grievance desired to be remedied. This petition (when founded on facts that may be in their nature disputed) is referred to a committee of members, who examine the matter alleged, and accordingly report it to the house; and then (or otherwise, upon the mere petition) leave is given to bring in the bill. In public matters the bill is brought in upon motion made to the house, without any petition at all. Formerly, all bills were drawn in the form of petitions (59), which were en-

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times the double vote of a person, who first votes with the rest, and then, upon an equality, creates a majority by giving a second vote.

A casting vote neither exists in corporations nor elsewhere, unless it is expressly given by statute or charter, or, what is equivalent, exists by immemorial usage; and in such cases it cannot be created by a by-law. 6 *T. R.* 732.

(59) The commons for near two centuries continued the style of very humble petitioners. Their petitions frequently began with "your "poor commons beg and pray," and concluded with "for God's sake, "and as an act of charity:" *Vos poveres communes prient et supplient, pur Dieu et en oevre de charité.* (Rot. Par. passim.) It appears that prior to the reign of Hen. V. it had been the practice of the kings to add and enact more than the commons petitioned for. In consequence of this there is a very memorable petition from the commons in 2 Hen. V. which states, that it is the liberty and freedom of the commons that there should be no statute without their assent, considering that they have ever been as well *assentere* as *petitioners*, and therefore they pray that for the future there may be no additions to or diminutions of their petitions. And in answer to this the king granted that from hence-

tered upon the *parliament rolls*, with the king's answer thereunto subjoined; not in any settled form of words, but as the circumstances of the case required[t]: and at the end of each parliament the judges drew them into the form of a statute, which was entered on the *statute rolls*. In the reign of Henry V, to prevent mistakes and abuses, the statutes were drawn up by the judges before the end of the parliament; and, in the reign of Henry VI, bills in the form of acts, according to the modern custom, were first introduced.

THE persons directed to bring in the bill, present it in a competent time to the house, drawn out on paper, with a multitude of blanks, or void spaces, where any thing occurs that is dubious, or necessary to be settled by the parliament itself; (such especially as the precise date of times, the nature and quantity of penalties, or of any sums of money to be raised) being indeed only the skeleton of the bill. In the house of lords, if the bill begins there it is (when of a private nature) referred to two of the judges, to examine and report the state of the facts alleged, to see that all necessary parties consent, and to settle all points of technical propriety. This is read a first time, and at a convenient distance a second time; and after each reading the speaker opens to the house the substance of the bill, and puts the question, whether it shall proceed any farther? The introduction of the bill may be originally opposed, as the bill itself may at either of the readings; and, if the opposition succeeds, the bill must be

t See, among numberless other instances, the *articuli cleri*, 9 Edw. II.

forth they should be bound in no instance without their assent, saving his royal prerogative to grant or deny what he pleased of their petitions. (*Ruff. Pref.* xv. *Rot. Parl.* 2 *Hen. V.* n° 22.) It was long after their creation, or rather separation from the barons, before the house of commons were conscious of their own strength and dignity: and such was their modesty and diffidence, that they used to request the lords to send them some of their members to instruct them in their duty, "on account of the arduousness of their charge, and the feebleness "of their own powers and understandings:" *pur l'arduitè de lour charge, et le feoblesce de lour poiars et sens.* (Rot. Parl. 1 Ric. II. n° 4.)

dropped for that session: as it must also, if opposed with success in any of the subsequent stages.

After the second reading it is committed, that is, referred to a committee; which is either selected by the house in matters of small importance, or else, upon a bill of consequence, the house resolves itself into a committee of the whole house. A committee of the whole house is composed of every member; and, to form it, the speaker quits the chair, (another member being appointed chairman,) and may sit and debate as a private member. In these committees the bill is debated clause by clause, amendments made, the blanks filled up, and sometimes the bill entirely new modelled.
[183] After it has gone through the committee, the chairman reports it to the house with such amendments as the committee have made; and then the house reconsiders the whole bill again, and the question is repeatedly put upon every clause and amendment. When the house hath agreed or disagreed to the amendments of the committee, and sometimes added new amendments of its own, the bill is then ordered to be engrossed, or written in a strong gross hand, on one or more long rolls (or presses) of parchment sewed together. When this is finished, it is read a third time, and amendments are sometimes then made to it; and if a new clause be added, it is done by tacking a separate piece of parchment on the bill, which is called a ryder[u]. The speaker then again opens the contents; and, holding it up in his hands, puts the question, whether the bill shall pass? If this is agreed to, the title to it is then settled; which used to be a general one for all the acts passed in the session, till in the first year of Henry VIII distinct titles were introduced for each chapter. After this, one of the members is directed to carry it to the lords, and desire their concurrence; who, attended by several more, carries it to the bar of the house of peers, and there delivers it to their speaker, who comes down from his woolsack to receive it.

[u] Noy. 84.

It there passes through the same forms as in the other house, (except engrossing, which is already done,) and, if rejected, no more notice is taken, but it passes *sub silentio*, to prevent unbecoming altercations. But if it is agreed to, the lords send a message by two masters in chancery (or upon matters of high dignity or importance, by two of the judges) that they have agreed to the same: and the bill remains with the lords, if they have made no amendment to it. But if any amendments are made, such amendments are sent down with the bill to receive the concurrence of the commons. If the commons disagree to the amendments, a conference usually follows between members deputed from each house; who for the most part settle and adjust the difference: but, if both houses remain inflexible, the bill is dropped. If the commons agree to the amendments, the bill is sent back to the lords by one of the members, with a message to acquaint them therewith. The same forms are observed, *mutatis mutandis*, when the bill begins in the house of lords. But, when an act of grace or pardon is passed, it is first signed by his majesty, and then read once only in each of the houses, without any new engrossing or amendment [w]. And when both houses have done with any bill, it always is deposited in the house of peers, to wait the royal assent; except in the case of a bill of supply, which after receiving the concurrence of the lords is sent back to the house of commons [x].

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The royal assent may be given two ways: 1. In person; when the king comes to the house of peers, in his crown and royal robes, and sending for the commons to the bar, the titles of all the bills that have passed both houses are read; and the king's answer is declared by the clerk of the parliament in Norman-French (60): a badge, it must be owned, (now the

w D'ewes's journ. 20. 73. Com. journ. 17 June 1747.

x Com. journ. 24 Jul. 1660.

(60) Until the reign of Richard III. almost all the statutes are either in French or Latin, but generally in French. I have never seen any rea-

only one remaining,) of conquest; and which one could wish to see fall into total oblivion, unless it be reserved as a solemn memento to remind us that our liberties are mortal, having once been destroyed by a foreign force. If the king consents to a public bill, the clerk usually declares, "*le roy le veut*, the "king wills it so to be;" if to a private bill, "*soit fait comme* "*il est desirè*, be it as it is desired." If the king refuses his assent, it is in the gentle language of "*le roy s'aviscra* (61), the "king will advise upon it." When a bill of supply is passed, it is carried up and presented to the king by the speaker of the house of commons[y]; and the royal assent is thus expressed,

y Rot. Parl. 9 Hen. IV. in Pryn. 4 Inst. 30, 31.

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son assigned for this change in the language of the statutes. Richard being an usurper, probably thought that it would procure him a degree of popularity to give the people statutes in their own language, which had hitherto been as illegible as the laws of Caligula. But the general answers of the king to the bills were so well understood, that a change in them was of no importance to the people, and only desirable for the sake of consistency.

(61) The words *le roi s'avisera* correspond to the phrase formerly used by courts of justice, when they required time to consider of their judgment, viz. *curia advisare vult*. And there can be little doubt but originally these words implied a serious intent to take the subject under consideration, and they only became in effect a negative, when the bill or petition was annulled by a dissolution, before the king communicated the result of his deliberation: for in the rolls of parliament the king sometimes answers, that the petition is unreasonable, and cannot be granted; sometimes he answers, that he and his council will consider of it; as in 37 Ed. III. n° 33. *Quant au ceste article, il demande grand avisement, et partant le roi se ent avisera par son conseil.*

This prerogative of rejecting bills was exercised to such an extent in ancient times, that D'ewes informs us, that queen Elizabeth, at the close of one session, gave her assent to 24 public and 19 private bills; and at the same time rejected 48, which had passed the two houses of parliament. (*Journ.* 596.) But the last time it was exerted was in the year 1692 by William III. who at first refused his assent to the bill for triennial parliaments, but was prevailed upon to permit it to be enacted two years afterwards. *De Lolme*, 404.

"*le roy remercie ses loyal subjects, accepte lour benevolence,* "*et aussi le veut*, the king thanks his loyal subjects, accepts "their benevolence, and wills it so to be." In case of an act of grace, which originally proceeds from the crown, and has the royal assent in the first stage of it, the clerk of the parliament thus pronounces the gratitude of the subject; "*les* "*prelats, seigneurs, et commons, en ce present parliament as-* "*semblees, au nom de touts vous autres subjects, re-*
"*mercient tres humblement votre majeste, et prient a* [185]
"*Dieu vous donner en sante bone vie et longue*; the "prelates, lords, and commons, in this present parliament "assembled, in the name of all your other subjects, most "humbly thank your majesty, and pray to God to grant you "in health and wealth long to live[z]." 2. By the statute 33 Hen. VIII. c. 21. the king may give his assent by letters patent under his great seal, signed with his hand, and notified in his absence to both houses assembled together in the high house. And, when the bill has received the royal assent in either of these ways, it is then, and not before, a statute or act of parliament.

THIS statute or act is placed among the records of the kingdom; there needing no formal promulgation to give it the force of a law, as was necessary by the civil law with regard to the emperor's edicts: because every man in England is, in judgment of law, party to the making of an act of parliament, being present thereat by his representatives. However, a copy thereof is usually printed at the king's press for the information of the whole land. And formerly, before the invention of printing, it was used to be published by the sheriff of every county; the king's writ being sent to him at the end of every session, together with a transcript of all the acts made at that session, commanding him, "*ut statuta illa, et omnes articulos* "*in eisdem contentos, in singulis locis ubi expedire viderit, pub-* "*lice proclamari, et firmiter teneri et observari faciat.*" And the usage was to proclaim them at his county court, and

[z] D'ewes' journ. 34.

there to keep them, that whoever would might read or take copies thereof; which custom continued till the reign of Henry the seventh[a].

An act of parliament, thus made, is the exercise of the highest authority that this kingdom acknowledges upon earth. It hath power to bind every subject in the land, and the dominions thereunto belonging; nay, even the king himself, if particularly named therein. And it cannot be altered, [186] amended, dispensed with, suspended, or repealed, but in the same forms and by the same authority of parliament; for it is a maxim in law, that it requires the same strength to dissolve, as to create an obligation. It is true it was formerly held, that the king might in many cases dispense with penal statutes[b]: but now by statute 1 W. & M. st. 2. c. 2. it is declared, that the suspending or dispensing with laws by regal authority, without consent of parliament, is illegal.

VII. There remains only, in the seventh and last place, to add a word or two concerning the manner in which parliaments may be adjourned, prorogued, or dissolved.

An adjournment is no more than a continuance of the session from one day to another, as the word itself signifies: and this is done by the authority of each house separately every day; and sometimes for a fortnight or a month together, as at Christmas or Easter, or upon other particular occasions. But the adjournment of one house is no adjournment of the other[c]. It hath also been usual, when his majesty hath signified his pleasure that both or either of the houses should adjourn themselves to a certain day, to obey the king's pleasure so signified, and to adjourn accordingly[d]. Otherwise, besides the indecorum of a refusal, a prorogation would assuredly follow; which would often be very inconvenient to both

a 3 Inst. 41. 4 Inst. 26.
b Finch. L. 81. 234. Bacon. Elem. c. 19.
c 4 Inst. 28.
d Com. journ. *passim*: *e. g.* 11 Jun. 1572. 5 Apr. 1604. 4 Jun. 14 Nov. 18 Dec. 1621. 11 Jul. 1625. 13 Sept. 1660. 25 Jul. 1667. 6 Aug. 1685. 24 Feb. 1691. 21 Jan. 1712. 16 Apr. 1717. 3 Feb. 1741. 19 Dec. 1746. 21 May 1768.

public and private business. For prorogation puts an end to the session; and then such bills as are only begun and not perfected, must be resumed *de novo* (if at all) in a subsequent session: whereas, after an adjournment, all things continue in the same state as at the time of the adjournment made, and may be proceeded on without any fresh commencement.

A PROROGATION is the continuance of the parliament from one session to another, as an adjournment is the continuation of the session from day to day. This is done by the royal authority, expressed either by the lord chancellor in his majesty's presence, or by commission from the crown, or frequently by proclamation (62). Both houses are necessarily prorogued at the same time; it not being a prorogation of the house of lords, or commons, but of the parliament. The session is never understood to be at an end until a prorogation: though, unless some act be passed or some judgment given in parliament, it is in truth no session at all[e] (63). And [187]

e 4 Inst. 28. Hale of parl. 38. Hut. 61.

(62) At the beginning of a new parliament, when it is not intended that the parliament should meet at the return of the writ of summons for the despatch of business, the practice is, to prorogue it by a writ of prorogation, as the parliament in 1790 was prorogued twice by writ; *Comm. Journ.* 26th Nov. 1790; and the first parliament in this reign was prorogued by four writs. *Ib.* 3 Nov. 1761. On the day upon which the writ of summons is returnable, the members of the house of commons who attend, do not enter their own house, or wait for a message from the lords, but go immediately up to the house of lords, where the chancellor reads the writ of prorogation. *Ib.* And when it is intended that they should meet upon the day to which the parliament is prorogued for despatch of business, notice is given by a proclamation.

(63) Mr. Hatsell mentions one great inconvenience which, he apprehends, might arise from this rule: The 6 Ann. c. 7. s. 6. provides, that upon the death of the king, if there is no parliament in being *that has met and sat*, then the last preceding parliament shall immediately convene and sit, as if the said parliament had never been dissolved. He says, the construction of the words *has met and sat*, has always been understood to be a parliament of which a session has been held.

formerly the usage was, for the king to give the royal assent to all such bills as he approved, at the end of every session, and then to prorogue the parliament; though sometimes only for a day or two[f]; after which all business then depending in the houses was to be begun again. Which custom obtained so strongly, that it once became a question[g], whether giving the royal assent to a single bill did not of course put an end to the session. And, though it was then resolved in the negative, yet the notion was so deeply rooted, that the statute 1 Car. I. c. 7.

[f] Com. journ. 21 Oct. 1553. [g] Ibid. 21 Nov. 1554.

(2 *Hats.* 219.) This is a construction to which I cannot accede. The word *session* has a legal and technical signification; we know its properties and consequences, but there is no reason that we should annex them all to the popular word *sit*. The object of the statute was probably this, viz. if the king should die after the issuing the writs for a new parliament during a general election, that the kingdom should not continue in a state of ferment and confusion, but that the old parliament should immediately revive and convene. It never could be the intention of the legislature, that, after the members of a new parliament had qualified themselves, and had been sitting perhaps for many weeks, this parliament upon the death of the king should be sent home, and the members of the old parliament should be collected, merely because the new parliament had not passed a bill. I conceive it would be sufficient to satisfy the provision of this statute, that such a number of members had met, and had taken the oaths, as to actually constitute a house in each house of parliament. To sit in this case must be equivalent to take their seats, which is its signification in the same sentence, viz. *to convene and sit*, otherwise the new king would be compelled to make a session, by assenting to a bill before he prorogued or dissolved them. But to guard against any inconvenience, which might eventually arise from the uncertainty of these words, that part of the statute 6 Ann. c. 7. is repealed by the 37 Geo. III. c. 127. which enacts, that in case of the demise of his majesty between the dissolution of the parliament and the day appointed by the writs of summons, then the last preceding parliament shall immediately convene and sit, and continue for six months unless sooner prorogued or dissolved by the new king; but if the king dies on the day appointed for assembling the new parliament, or at any time after such day, and before such new parliament shall have met and sat, then the new parliament in like manner shall meet and sit for the space of six months, unless sooner prorogued or dissolved.

was passed to declare, that the king's assent to that and some other acts should not put an end to the session; and, even so late as the reign of Charles II, we find a proviso frequently tacked to a bill[h], that his majesty's assent thereto should not determine the session of parliament. But it now seems to be allowed, that a prorogation must be expressly made, in order to determine the session. And, if at the time of an actual rebellion, or imminent danger of invasion, the parliament shall be separated by adjournment or prorogation, the king is empowered[i] to call them together by proclamation, with fourteen days notice of the time appointed for their reassembling (64.)

h Stat. 12 Car. II. c. 1. 22 and 23 Car. II. c. 1. i Stat. 30 Geo. II. c. 25.

(64) This was provided by a clause in several militia acts, but that provision is materially altered by the 26 Geo. III. c. 107. It has been held that after a prorogation, except under the circumstances and in the manner described in that statute, the king cannot summon a parliament before the day to which it was last prorogued. And it is understood, that when a parliament is prorogued to a certain day, they do not meet on that day, unless it be particularly declared by the proclamation that gives notice of the prorogation, that they shall meet for the despatch of business; and when it has not been prorogued by such a proclamation, and it is intended that parliament shall actually sit, it is the established practice to issue a proclamation to give notice that it is for the despatch of business; and this proclamation, unless upon some urgent occasion, bears date at least forty days before the meeting. (2 *Hats.* 239.) But by 26 Geo. III. c. 107. s. 95. in all cases of actual invasion or imminent danger of it, and in cases of rebellion or insurrection, the king having first communicated the occasion to parliament, if sitting, and if no parliament be sitting, having notified the occasion by proclamation, may order the militia to be called out and embodied. And whenever this is done, if the parliament be adjourned or prorogued, he shall convene them within fourteen days.

Pursuant to this statute the parliament met on the 13th Dec. 1792; but now in all cases it is enacted by the 37 Geo. III. c. 127. that whenever his majesty is pleased to issue his proclamation, giving notice of his intention that parliament shall meet for the despatch of business on any day not less than fourteen days from the date of the proclamation,

A DISSOLUTION is the civil death of the parliament; and this may be effected three ways: 1. By the king's will, expressed either in person or by representation. For, as the king has the sole right of convening the parliament, so also it is a branch of the royal prerogative, that he may (whenever he pleases) prorogue the parliament for a time, or put a final period to its existence. If nothing had a right to prorogue or dissolve a parliament but itself, it might happen to become perpetual. And this would be extremely dangerous, if at any time it should attempt to encroach upon the executive power: as was fatally experienced by the unfortunate king Charles the first; who, having unadvisedly passed an act to continue the parliament then in being till such time as it should please to dissolve itself, at last fell a sacrifice to that inordinate power, which he himself had consented to give them. It is therefore extremely necessary that the crown should be empowered to regulate the duration of these assemblies, under the limitations which the English constitution has prescribed: so that, on the one hand, they may frequently and regularly come together for the despatch of business, and redress of grievances; and may not, on the other, even with the consent of the crown, be continued to an inconvenient or unconstitutional length.

2. A PARLIAMENT may be dissolved by the demise of the crown. This dissolution formerly happened immediately

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the parliament shall thereby stand prorogued to that day, notwithstanding any previous prorogation to a longer day.

By the 39 and 40 Geo. III. c. 14. in all cases where both houses of parliament shall stand adjourned for more than fourteen days, the king may issue a proclamation, declaring that the parliament shall meet on a day, being not less than fourteen days from the date of such proclamation, and the two houses of parliament shall stand adjourned to the day and place declared in such proclamation. And the orders, which shall be appointed for the day of adjournment, or for any day subsequent thereto, except such as shall be specially appointed for particular days, shall be deemed to be appointed for the day of adjournment fixed in the proclamation.

upon the death of the reigning sovereign: for he being considered in law as the head of the parliament, (*caput principium, et finis,*) that failing, the whole body was held to be extinct. But, the calling a new parliament immediately on the inauguration of the successor being found inconvenient, and dangers being apprehended from having no parliament in being in case of a disputed succession, it was enacted by the statutes 7 & 8 W. III. c. 15. and 6 Ann. c. 7. that the parliament in being shall continue for six months after the death of any king or queen, unless sooner prorogued or dissolved by the successor: that, if the parliament be, at the time of the king's death, separated by adjournment or prorogation, it shall notwithstanding assemble immediately; and that, if no parliament is then in being, the members of the last parliament shall assemble, and be again a parliament.

3. LASTLY, a parliament may be dissolved or [189] expire by length of time. For if either the legislative body were perpetual; or might last for the life of the prince who convened them, as formerly; and were so to be supplied, by occasionally filling the vacancies with new representatives; in these cases, if it where once corrupted, the evil would be past all remedy: but when different bodies succeed each other, if the people see cause to disapprove of the present, they may rectify its faults in the next. A legislative assembly also, which is sure to be separated again, (whereby, its members will themselves become private men, and subject to the full extent of the laws which they have enacted for others,) will think themselves bound, in interest as well as duty, to make only such laws as are good. The utmost extent of time that the same parliament was allowed to sit, by the statute 6 W. & M. c. 2. was *three* years; after the expiration of which, reckoning from the return of the first summons, the parliament was to have no longer continuance. But by the statute 1 Geo. I. st. 2. c. 38. (in order, professedly, to prevent the great and continued expenses of frequent elections, and the violent heats and animosities consequent there-

upon, and for the peace and security of the government then just recovering from the late rebellion) this term was prolonged to *seven* years: and, what alone is an instance of the vast authority of parliament, the very same house, that was chosen for three years, enacted its own continuance for seven (65). So that, as our constitution now stands, the parliament must expire, or die a natural death, at the end of every seventh year; if not sooner dissolved by the royal prerogative.

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(65) This has been thought by many an unconstitutional exertion of their authority; and the reason given is, that those who had a power delegated to them for three years only, could have no right to extend that term to seven years. But this has always appeared to me to be a fallacious mode of considering the subject. Before the triennial act, 6 W. & M. the duration of parliament was only limited by the pleasure or death of the king; and it never can be supposed that the next, or any succeeding parliament, had not the power of repealing the triennial act; and if that had been done, then, as before, they might have sat seventeen or seventy years. It is certainly true, that the simple repeal of a former statute would have extended their continuance much beyond what was done by the septennial act.

CHAPTER THE THIRD.

OF THE KING, AND HIS TITLE.

THE supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen: for it matters not to which sex the crown descends; but the person entitled to it, whether male or female, is immediately invested with all the ensigns, rights, and prerogatives of sovereign power; as is declared by statute 1 Mar. st. 3. c. 1.

IN discoursing of the royal rights and authority, I shall consider the king under six distinct views: 1. With regard to his title. 2. His royal family. 3. His councils. 4. His duties. 5. His prerogative. 6. His revenue. And first, with regard to his title.

THE executive power of the English nation being vested in a single person, by the general consent of the people, the evidence of which general consent is long and immemorial usage, it became necessary to the freedom and peace of the state, that a rule should be laid down, uniform, universal, and permanent; in order to mark out with precision, *who* is that single person, to whom are committed (in subservience to the law of the land) the care and protection of the community; and to whom, in return, the duty and allegiance of every individual are due. It is of the highest importance to the public tranquillity, and to the consciences

of private men, that this rule should be clear and indisputable: and our constitution has not left us in the dark upon this material occasion. It will therefore be the endeavour of this chapter to trace out the constitutional doctrine of the royal succession, with that freedom and regard to truth, yet mixed with that reverence and respect, which the principles of liberty and the dignity of the subject require.

The grand fundamental maxim upon which the *jus coronae*, or right of succession to the throne of these kingdoms, depends, I take to be this: "that the crown is, by common "law and constitutional custom, hereditary; and this in a "manner peculiar to itself: but that the right of inheritance "may from time to time be changed or limited by act of "parliament; under which limitations the crown still con-"tinues hereditary." And this proposition it will be the business of this chapter to prove, in all its branches; first, that the crown is hereditary; secondly, that it is hereditary in a manner peculiar to itself; thirdly, that this inheritance is subject to limitation by parliament; lastly, that when it is so limited, it is hereditary in the new proprietor.

1. First, it is in general *hereditary*, or descendible to the next heir, on the death or demise of the last proprietor. All regal governments must be either hereditary or elective: and, as I believe there is no instance wherein the crown of England has ever been asserted to be elective, except by the regicides at the infamous and unparalleled trial of king Charles I, it must of consequence be hereditary. Yet while I assert an hereditary, I by no means intend a *jure divino*, title to the throne. Such a title may be allowed to have subsisted under the theocratic establishments of the children of Israel in Palestine: but it never yet subsisted in any other country; save only so far as kingdoms, like other human fabrics, are subject to the general and ordinary dispensations of providence. Nor indeed have a *jure divino* and an *hereditary* right any necessary connexion with each other; as some have very weakly imagined. The titles of David and Jehu were

equally *jure divino*, as those of either Solomon or Ahab; and yet David slew the sons of his predecessor, and Jehu his predecessor himself. And when our kings have the same warrant as they had, whether it be to sit upon the throne of their fathers, or to destroy the house of the preceding sovereign, they will then, and not before, possess the crown of England by a right like theirs, *immediately* derived from heaven. The hereditary right which the laws of England acknowledge, owes its origin to the founders of our constitution, and to them only. It has no relation to, nor depends upon, the civil laws of the Jews, the Greeks, the Romans, or any other nation upon earth: the municipal laws of one society having no connexion with, or influence upon, the fundamental polity of another. The founders of our English monarchy might perhaps, if they had thought proper, have made it an elective monarchy: but they rather chose, and upon good reason, to establish originally a succession by inheritance. This has been acquiesced in by general consent; and ripened by degrees into common law: the very same title that every private man has to his own estate. Lands are not naturally descendible any more than thrones: but the law has thought proper, for the benefit and peace of the public, to establish hereditary succession in the one as well as the other.

It must be owned, an elective monarchy seems to be the most obvious, and best suited of any to the rational principles of government, and the freedom of human nature: and accordingly we find from history that, in the infancy and first rudiments of almost every state, the leader, chief magistrate, or prince, hath usually been elective. And, if the individuals who compose that state could always continue true to first principles, uninfluenced by passion or prejudice, unassailed by corruption, and unawed by violence, elective succession were as much to be desired in a kingdom, as in other inferior communities. The best, the wisest, and the bravest man would then be sure of receiving that crown, which his endowments have merited; and the sense of an unbiassed ma-

jority would be dutifully acquiesced in by the few who were of different opinions. But history and observation will inform us, that elections of every kind (in the present state of human nature) are too frequently brought about by influence, partiality, and artifice: and, even where the case is otherwise, these practices will be often suspected, and as constantly charged upon the successful, by a splenetic disappointed minority. This is an evil to which all societies are liable; as well those of a private and domestic kind, as the great community of the public, which regulates and includes the rest. But in the former there is this advantage; that such suspicions, if false, proceed no farther than jealousies and murmurs, which time will effectually suppress; and, if true, the injustice may be remedied by legal means, by an appeal to those tribunals to which every member of society has (by becoming such) virtually engaged to submit. Whereas, in the great and independent society, which every nation composes, there is no superior to resort to but the law of nature; no method to redress the infringements of that law but the actual exertion of private force. As therefore between two nations, complaining of mutual injuries, the quarrel can only be decided by the law of arms; so in one and the same nation, when the fundamental principles of their common union are supposed to be invaded, and more especially when the appointment of their chief magistrate is alleged to be unduly made, the only tribunal to which the complainants can appeal is that of the God of battles, the only process by which the appeal can be carried on is that of a civil and intestine war. An hereditary succession to the crown is therefore now established, in this and most other countries, in order to prevent that periodical bloodshed and misery, which the history of ancient imperial Rome and the more modern experience of Poland and Germany, may shew us are the consequences of elective kingdoms.

2. But, secondly, as to the particular mode of inheritance, it is general corresponds with the feodal path of descents, chalked out by the common law in the succession to landed

estates; yet with one or two material exceptions. Like estates, the crown will descend lineally to the issue of the reigning monarch: as it did from king John to Richard II, through a regular pedigree of six lineal generations. As in com- [194] mon descents, the preference of males to females, and the right of primogeniture among the males, are strictly adhered to. Thus Edward V, succeeded to the crown in preference to Richard his younger brother and Elizabeth his elder sister. Like lands or tenements, the crown, on failure of the male line, descends to the issue female; according to the ancient British custom remarked by Tacitus[a]; "*solent foeminarum duotu bellare, et sexum in imperiis non discernere.*" Thus Mary I, succeeded to Edward VI; and the line of Margaret queen of Scots, the daughter of Henry VII, succeeded on failure of the line of Henry VIII, his son. But, among the females, the crown descends by right of primogeniture to the eldest daughter only and her issue; and not, as in common inheritances, to all the daughters at once; the evident necessity of a sole succession to the throne having occasioned the royal law of descents to depart from the common law in this respect; and therefore queen Mary on the death of her brother succeeded to the crown alone, and not in partnership with her sister Elizabeth. Again: the doctrine of representation prevails in the descent of the crown, as it does in other inheritances; whereby the lineal descendants of any person deceased stand in the same place as their ancestor, if living, would have done. Thus Richard II. succeeded his grandfather Edward III, in right of his father the black prince; to the exclusion of all his uncles, his grandfather's younger children. Lastly, on failure of lineal descendants, the crown goes to the next collateral relations of the late king; provided they are lineally descended from the blood royal, that is, from that royal stock which originally acquired the crown. Thus Henry I. succeeded to William II, John to Richard I, and James I. to Elizabeth; being all derived from the conqueror, who was then the only regal stock. But herein there is no objection (as in the case of common descents) to the succession of a bro-

[a] In vit. Agricolae.

ther, an uncle, or other collateral relation, of the *half* blood; that is, where the relationship proceeds not from the same *couple* of ancestors (which constitutes a kinsman of the *whole* blood) but from a *single* ancestor only; as when two persons are derived from the same father, and not from the [195] same mother, or *vice versa:* provided only, that the one ancestor, from whom both are descended, be that from whose veins the blood royal is communicated to each. Thus Mary I. inherited to Edward VI, and Elizabeth inherited to Mary; all children of the same father, king Henry VIII, but all by different mothers. The reason of which diversity, between royal and common descents, will be better understood hereafter, when we examine the nature of inheritances in general.

3. The doctrine of *hereditary* right does by no means imply an *indefeasible* right to the throne. No man will, I think, assert this, that has considered our laws, constitution, and history, without prejudice, and with any degree of attention. It is unquestionably in the breast of the supreme legislative authority of this kingdom, the king and both houses of parliament, to defeat this hereditary right; and, by particular entails, limitations, and provisions, to exclude the immediate heir, and vest the inheritance in any one else. This is strictly consonant to our laws and constitution; as may be gathered from the expression so frequently used in our statute book, of "the king's majesty, his heirs, and successors." In which we may observe, that as the word, "heirs," necessarily implies an inheritance or hereditary right, generally subsisting in the royal person; so the word "successors," distinctly taken, must imply that this inheritance may sometimes be broken through; or, that there may be a successor, without being the heir, of the king. And this is so extremely reasonable, that without such a power, lodged somewhere, our polity would be very defective. For, let us barely suppose so melancholy a case, as that the heir apparent should be a lunatic, an idiot, or otherwise incapable of reigning: how miserable would the condition of the nation be, if he were also incapable of being set aside! It is therefore necessary that this

power should be lodged somewhere: and yet the inheritance, and regal dignity, would be very precarious indeed, if this power were *expressly* and *avowedly* lodged in the hands of the subject only, to be exerted whenever prejudice, caprice, or discontent should happen to take the lead. Consequently it can no where be so properly lodged as in the two houses of parliament, by and with the consent of the [196] reigning king; who, it is not to be supposed, will agree to any thing improperly prejudicial to the rights of his own descendants. And therefore in the king, lords, and commons, in parliament assembled, our laws have expressly lodged it.

4. But, fourthly; however the crown may be limited or transferred, it still retains its descendible quality, and becomes hereditary in the wearer of it. And hence in our law the king is said never to die, in his political capacity; though, in common with other men, he is subject to mortality in his natural: because immediately upon the natural death of Henry, William, or Edward, the king survives in his successor. For the right of the crown vests, *eo instanti*, upon his heir; either the *haeres natus*, if the course of descent remains unimpeached, or the *haeres factus*, if the inheritance be under any particular settlement. So that there can be no *interregnum* (1); but, as sir Matthew Hale[b] observes, the right of sovereignty is fully invested in the successor by the very descent of the crown. And therefore, however acquired, it becomes in him absolutely hereditary, unless by the rules of the limitation it is otherwise ordered and determined. In the same manner as landed estates, to continue our former comparison, are by the law hereditary, or descendible to the heirs of the owner; but still there exists a power, by which

b 1 Hist. P. C. 61.

(1) Hence the statutes passed in the first year after the restoration of Car. II. are always called the acts in the twelfth year of his reign; and all the other legal proceedings of that reign are reckoned from the year 1648, and not from 1660.

the property of those lands may be transferred to another person. If this transfer be made simply and absolutely, the lands will be hereditary in the new owner, and descend to his heir at law: but if the transfer be clogged with any limitations, conditions, or entails, the lands must descend in that channel, so limited and prescribed, and no other.

In these four points consists, as I take it, the constitutional notion of hereditary right to the throne: which will be still farther elucidated, and made clear beyond all dispute, from a short historical view of the successions to the crown of England, the doctrines of our ancient lawyers, and the several acts of parliament that have from time to time been made, to create, to declare, to confirm, to limit, or to bar [197] the hereditary title to the throne. And in the pursuit of this inquiry we shall find, that, from the days of Egbert, the first sole monarch of this kingdom, even to the present, the four cardinal maxims above-mentioned have ever been held the constitutional canons of succession. It is true, the succession, through fraud, or force, or sometimes through necessity, when in hostile times the crown descended on a minor or the like, has been very frequently suspended; but has generally at last returned back into the old hereditary channel, though sometimes a very considerable period has intervened. And, even in those instances where the succession has been violated, the crown has ever been looked upon as hereditary in the wearer of it. Of which the usurpers themselves were so sensible, that they for the most part endeavoured to vamp up some feeble shew of a title by descent, in order to amuse the people, while they gained the possession of the kingdom. And, when possession was once gained, they considered it as the purchase or acquisition of a new estate of inheritance, and transmitted or endeavoured to transmit it to their own posterity, by a kind of hereditary right of usurpation.

King Egbert, about the year 800, found himself in possession of the throne of the West Saxons, by a long and undisturbed descent from his ancestors of above three hundred

years. How his ancestors acquired their title, whether by force, by fraud, by contract, or by election, it matters not much to inquire; and is indeed a point of such high antiquity, as must render all inquiries at best but plausible guesses. His right must be supposed indisputably good, because we know no better. The other kingdoms of the heptarchy he acquired, some by consent, but most by a voluntary submission. And it is an established maxim in civil polity, and the law of nations, that when one country is united to another in such a manner, as that one keeps its government and states, and the other loses them; the latter entirely assimilates with or is melted down in the former, and must adopt its laws and customs[c]. And in pursuance of this maxim there hath ever been, since the union of the heptarchy in king Egbert, a general acquiescence under the hereditary monarchy of the West Saxons, through all the united kingdoms. [198]

From Egbert to the death of Edmund Ironside, a period of above two hundred years, the crown descended regularly, through a succession of fifteen princes, without any deviation or interruption: save only that the sons of king Ethelwolf succeeded to each other in the kingdom, without regard to the children of the elder branches, according to the rule of succession prescribed by their father, and confirmed by the wittena-gemote, in the heat of the Danish invasions; and also that king Edred, the uncle of Edwy, mounted the throne for about nine years, in the right of his nephew a minor, the times being very troublesome and dangerous. But this was with a view to preserve, and not to destroy, the succession; and accordingly Edwy succeeded him.

King Edmund Ironside was obliged, by the hostile irruption of the Danes, at first to divide his kingdom with Canute king of Denmark; and Canute, after his death, seized the whole of it, Edmund's sons being driven into foreign countries. Here the succession was suspended by actual force, and a new family introduced upon the throne: in whom however

c Puff. L. of N. and N. b. 8, c. 12. sec. 6.

this new acquired throne continued hereditary for three reigns; when, upon the death of Hardiknute, the ancient Saxon line was restored in the person of Edward the confessor.

He was not indeed the true heir to the crown, being the younger brother of king Edmund Ironside, who had a son Edward, sirnamed (from his exile) the outlaw, still living. But this son was then in Hungary; and, the English having just shaken off the Danish yoke, it was necessary that somebody on the spot should mount the throne; and the confessor was the next of the royal line then in England. On his decease without issue, Harold II. usurped the throne; and almost at the same instant came on the Norman invasion: the right to the crown being all the time in Edgar, sirnamed Atheling, (which signifies in the Saxon language *illustrious*, or of royal blood,) who was the son of Edward the [199] outlaw, and grandson of Edmund Ironside; or, as Matthew Paris[d] well expresses the sense of our old constitution, "*Edmundus autem latusferreum, rex naturalis "de stirpe regum, genuit Edwardum; et Edwardus genuit "Edgarum, cui de jure debebatur regnum Anglorum.*"

William the Norman claimed the crown by virtue of a pretended grant from king Edward the confessor; a grant which, if real, was in itself utterly invalid: because it was made, as Harold well observed in his reply to William's demand[e], "*absque generali senatus, et populi conventu et edicto;*" which also very plainly implies, that it then was generally understood that the king, with consent of the general council, might dispose of the crown and change the line of succession. William's title however was altogether as good as Harold's, he being a mere private subject, and an utter stranger to the royal blood. Edgar Atheling's undoubted right was overwhelmed by the violence of the times; though frequently asserted by the English nobility after the conquest, till such time as he died without issue: but all their attempts proved unsuccessful, and only served the more firmly to establish the crown in the family which had newly acquired it.

d A. D. 1066. e William of Malmsb. l. 7.

This conquest then by William of Normandy was, like that of Canute before, a forcible transfer of the crown of England into a new family; but, the crown being so transferred, all the inherent properties of the crown were with it transferred also. For, the victory obtained at Hastings not being[f] a victory over the nation collectively, but only over the person of Harold, the only right that the conqueror could pretend to acquire thereby, was the right to possess the crown of England, not to alter the nature of the government. And therefore, as the English laws still remained in force, he must necessarily take the crown subject to those laws, and with all its inherent properties; the first and principal of which was its descendibility. Here then we must drop our race of Saxon kings, at least for a while, and derive our descents from William the conqueror as from a new stock, who acquired by right of war (such as it is, yet still the *dernier resort* of kings) a strong and undisputed [200] title to the inheritable crown of England.

ACCORDINGLY it descended from him to his sons William II. and Henry I. Robert, it must be owned, his eldest son, was kept out of possession by the arts and violence of his brethren; who perhaps might proceed upon a notion, which prevailed for some time in the law of descents, (though never adopted as the rule of public successions[g]), that when the eldest son was already provided for, (as Robert was constituted duke of Normandy by his father's will,) in such a case the next brother was entitled to enjoy the rest of their father's inheritance. But, as he died without issue, Henry at last had a good title to the throne, whatever he might have at first.

STEPHEN of Blois, who succeeded him, was indeed the grandson of the conqueror, by Adelicia his daughter, and claimed the throne by a feeble kind of hereditary right: not as being the nearest of the male line, but as the nearest male of the blood royal, excepting his elder brother Theobald;

f Hale, Hist. C. L. c. 5. Seld. review of tithes, c. 8.

g See lord Lyttleton's life of Henry II. Vol. I. p. 467.

who was earl of Blois, and therefore seems to have waved, as he certainly never insisted on, so troublesome and precarious a claim. The real right was in the empress Matilda or Maud, the daughter of Henry I; the rule of succession being (where women are admitted at all) that the daughter of a son shall be preferred to the son of a daughter. So that Stephen was little better than a mere usurper; and therefore he rather chose to rely on a title by election[h], while the empress Maud did not fail to assert her hereditary right by the sword: which dispute was attended with various success, and ended at last in the compromise made at Wallingford, that Stephen should keep the crown, but that Henry the son of Maud should succeed him; as he afterwards accordingly did.

HENRY, the second of that name, was (next after his mother Matilda) the undoubted heir of William the conqueror; but he had also another connexion in blood, which [201] endeared him still farther to the English. He was lineally descended from Edmund Ironside, the last of the Saxon race of hereditary kings. For Edward the outlaw, the son of Edmund Ironside, had (besides Edgar Atheling, who died without issue) a daughter Margaret, who was married to Malcolm king of Scotland; and in her the Saxon hereditary right resided. By Malcolm she had several children, and among the rest Matilda the wife of Henry I, who by him had the empress Maud, the mother of Henry II. Upon which account the Saxon line is in our histories frequently said to have been restored in his person: though in reality that right subsisted in the *sons* of Malcolm by queen Margaret; king Henry's best title being as heir to the conqueror.

FROM Henry II. the crown descended to his eldest son Richard I, who dying childless, the right vested in his nephew Arthur, the son of Geoffrey his next brother: but John, the youngest son of king Henry, seised the throne; claiming, as appears from his charters, the crown by hereditary right[i]:

h "Ego Stephanus Dei gratia assensu cleri et populi in regem Anglorum electus etc." (Cart. A. D. 1136. Ric. de Hagustald. 311. Hearne ad Guil. Neubr. 711.)

i "—Regni Angliæ; quod nobis jure competit hæreditario." Spelm. Hist. R. Joh. apud Wilkins 354.

that is to say, he was next of kin to the deceased king, being his surviving brother: whereas Arthur was removed one degree farther, being his brother's son, though by right of representation he stood in the place of his father Geoffrey. And however flimsy this title, and those of William Rufus and Stephen of Blois, may appear at this distance to us, after the law of descents hath now been settled for so many centuries, they were sufficient to puzzle the understandings of our brave, but unlettered, ancestors. Nor indeed can we wonder at the number of partisans, who espoused the pretensions of king John in particular; since even in the reign of his father king Henry II, it was a point undetermined[i]; whether, even in common inheritances, the child of an elder brother should succeed to the land in right of representation, or the younger surviving brother in right of proximity of blood. Nor is it to this day decided in the collateral succession to the fiefs of the empire, whether the order of the stocks, or the proximity of degree, shall take place[k]. However, on the death of Arthur and his sister Eleanor [202] without issue, a clear and indisputable title vested in Henry III. the son of John: and from him to Richard the second, a succession of six generations, the crown descended in the true hereditary line. Under one of which race of princes[l] we find it declared in parliament, "that the law of the crown "of England is, and always hath been, that the children of "the king of England, whether born in England or elsewhere, ought to bear the inheritance after the death of their "ancestors. Which law our sovereign lord the king, the "prelates, earls, and barons, and other great men, together "with all the commons in parliament assembled, do approve "and affirm for ever."

UPON Richard the second's resignation of the crown, he having no children, the right resulted to the issue of his grandfather Edward III. That king had many children, besides his eldest, Edward the black prince of Wales, the father of Richard II: but to avoid confusion I shall only mention

i Glanv. l. 7. c. 3. k Mod. Un. Hist. xxx. 512. l Stat. 25 Edw. III. st. 2.

three; William his second son, who died without issue; Lionel duke of Clarence, his third son; and John of Gant, duke of Lancaster, his fourth. By the rules of succession therefore the posterity of Lionel duke of Clarence were entitled to the throne upon the resignation of king Richard; and had accordingly been declared by the king, many years before, the presumptive heirs of the crown: which declaration was also confirmed in parliament[m]. But Henry duke of Lancaster, the son of John of Gant, having then a large army in the kingdom, the pretence of raising which was to recover his patrimony from the king, and to redress the grievances of the subject, it was impossible for any other title to be asserted with any safety; and he became king under the title of Henry IV. But, as sir Matthew Hale remarks[n], though the people unjustly assisted Henry IV. in his usurpation of the crown, yet he was not admitted thereto, until he had declared that he claimed, not as a conqueror, (which he very much inclined to do[o],) but as a successor, descended by right line of the blood royal; as appears from the rolls of parliament in those times. And in order to this he set up a shew of
[203] two titles: the one upon the pretence of being the first of the blood royal in the entire male line, whereas the duke of Clarence left only one daughter Philippa; from which female branch, by a marriage with Edmond Mortimer earl of March, the house of York descended; the other, by reviving an exploded rumor, first propagated by John of Gant, that Edmond earl of Lancaster (to whom Henry's mother was heiress) was in reality the elder brother of king Edward I; though his parents, on account of his personal deformity, had imposed him on the world for the younger; and therefore Henry would be entitled to the crown, either as successor to Richard II, in case the entire male line was allowed a preference to the female; or, even prior to that unfortunate prince, if the crown could descend through a female, while an entire male line was existing.

[m] Standford's geneal. hist. 246. [n] Hist. C. L. c. 5. [o] Seld. tit. hon. 1. 3.

However, as in Edward the third's time we find the parliament approving and affirming the law of the crown, as before stated, so in the reign of Henry IV. they actually exerted their right of new-settling the succession to the crown. And this was done by the statute 7 Hen. IV. c. 2. whereby it is enacted, "that the inheritance of the crown and realms of "England and France, in all other the king's dominions, "shall be *set and remain* [p] in the person of our sovereign lord "the king, and in the heirs of his body issuing;" and prince Henry is declared heir apparent to the crown, to hold to him and the heirs of his body issuing, with remainder to lord Thomas, lord John, and lord Humphry, the king's sons, and the heirs of their bodies respectively: which is indeed nothing more than the law would have done before, provided Henry the fourth had been a rightful king. It however serves to shew that it was then generally understood, that the king and parliament had a right to new-model and regulate the succession to the crown: and we may also observe, with what caution and delicacy the parliament then avoided declaring any sentiment of Henry's original title. However sir Edward Coke more than once expressly declares [q], that at the time of passing this act the right of the crown was [204] in the descent from Philippa, daughter and heir of Lionel duke of Clarence.

Nevertheless the crown descended regularly from Henry IV. to his son and grandson Henry V. and VI; in the latter of whose reigns the house of York asserted their dormant title; and, after imbruing the kingdom in blood and confusion for seven years together, at last established it in the person of Edward IV. At his accession to the throne, after a breach of the succession that continued for three descents, and above threescore years, the distinction of a king *de jure* and a king *de facto* began to be first taken; in order to indemnify such as had submitted to the late establishment, and to provide for the peace of the kingdom by confirming

[p] Soit mys et demoerge. [q] 4 Inst. 37. 205.

all honors conferred and all acts done, by those who were now called the usurpers, not tending to the disherison of the rightful heir. In statute 1 Edw. IV. c. 1. the three Henrys are styled, "late kings of England successively in dede, and not of ryght." And, in all the charters which I have met with of king Edward, wherever he has occasion to speak of any of the line of Lancaster, he calls them "*nuper de facto, et* "*non de jure, reges Angliae.*"

EDWARD IV. left two sons and a daughter; the eldest of which sons, king Edward V, enjoyed the regal dignity for a very short time, and was then deposed by Richard his unnatural uncle, who immediately usurped the royal dignity; having previously insinuated to the populace a suspicion of bastardy in the children of Edward IV, to make a shew of some hereditary title: after which he is generally believed to have murdered his two nephews, upon whose death the right of the crown devolved to their sister Elizabeth.

THE tyrannical reign of king Richard III. gave occasion to Henry earl of Richmond to assert his title to the crown. A title the most remote and unaccountable that was ever set up, and which nothing could have given success to, but the universal detestation of the then usurper Richard. For, besides that he claimed under a descent from John of Gant, whose title was now exploded, the claim (such as it was) was through John earl of Somerset, a bastard son, begotten by [205] John of Gant upon Catherine Swinford. It is true, that, by an act of parliament 20 Ric. II, this son was, with others, legitimated and made inheritable to all lands, offices, and dignities, as if he had been born in wedlock: but still, with an express reservation of the crown, "*excepta dig-* "*nitate regali*[r]."

NOTWITHSTANDING all this, immediately after the battle of Bosworth-field, he assumed the regal dignity; the right of the crown then being, as sir Edward Coke expressly declares[s], in Elizabeth, eldest daughter of Edward IV: and his possession was established by parliament, holden the first

[r] 4 Inst. 36. [s] Ibid. 37.

year of his reign. In the act for which purpose, the parliament seems to have copied the caution of their predecessors in the reign of Henry IV: and therefore (as lord Bacon the historian of this reign observes) carefully avoided any recognition of Henry VII's right, which indeed was none at all; and the king would not have it by way of new law or ordinance, whereby a right might seem to be created and conferred upon him; and therefore a middle way was rather chosen, by way (as the noble historian expresses it) of *establishment*, and that under covert and indifferent words, "that the inheritance of the crown should *rest*, *remain*, and *abide* in king Henry VII. and the heirs of his body:" thereby providing for the future, and at the same time acknowledging his present possession; but not determining either way, whether that possession was *de jure* or *de facto* merely. However, he soon after married Elizabeth of York, the undoubted heiress of the conqueror, and thereby gained (as sir Edward Coke declares[t]) by much his best title to the crown. Whereupon the act made in his favor was so much disregarded, that it never was printed in our statute books.

Henry the eighth, the issue of this marriage, succeeded to the crown by clear indisputable hereditary right, and transmitted it to his three children in successive order. But in his reign we at several times find the parliament busy in regulating the succession to the kingdom. And, first, by statute 25 Hen. VIII. c. 12. which recites the [206] mischiefs which have and may ensue by disputed titles, because no perfect and substantial provision hath been made by law concerning the succession; and then enacts, that the crown shall be entailed to his majesty, and the sons or heirs male of his body; and in default of such sons to the lady Elizabeth (who is declared to be the king's eldest issue female, in exclusion of the lady Mary, on account of her supposed illegitimacy by the divorce of her mother queen Catharine) and to the lady Elizabeth's heirs of her body; and so on from issue female to issue female, and the heirs

[t] 4 Inst. 37.

of their bodies, by course of inheritance according to their ages, *as the crown of England hath been accustomed and ought to go*, in case where there be heirs female of the same: and in default of issue female, then to the king's right heirs for ever. This single statute is an ample proof of all the four positions we at first set out with.

But, upon the king's divorce from Ann Boleyn, this statute was, with regard to the settlement of the crown, repealed by statute 28 Hen. VIII. c. 7. wherein the lady Elizabeth is also, as well as the lady Mary, bastardized, and the crown settled on the king's children by queen Jane Seymour, and his future wives; and, in defect of such children, then with this remarkable remainder, to such persons as the king by letters patent, or last will and testament, should limit and appoint the same. A vast power; but notwithstanding, as it was regularly vested in him by the supreme legislative authority, it was therefore indisputably valid. But this power was never carried into execution; for by statute 35 Hen. VIII. c. 1. the king's two daughters are legitimated again, and the crown is limited to prince Edward by name, after that to the lady Mary, and then to the lady Elizabeth, and the heirs of their respective bodies; which succession took effect accordingly, being indeed no other than the usual course of the law, with regard to the descent of the crown.

But lest there should remain any doubt in the minds of the people, through this jumble of acts for limiting the succession, by statute 1 Mar. st. 2. c. 1. queen Mary's [207] hereditary right to the throne is acknowledged and recognised in these words: "the crown of these "realms is most lawfully, justly, and rightly *descended* and "come to the queen's highness that now is, being the very, "true, and undoubted heir and inheritrix thereof." And again, upon the queen's marriage with Philip of Spain, in the statute which settles the preliminaries of that match[t], the hereditary right to the crown is thus asserted and declared: "as touching the right of the queen's inheritance in the

[t] 1 Mar. st. 2. c. 2.

"realm and dominions of England, the children, whether male "or female, shall succeed in them, according to the known "laws, statutes, and customs of the same." Which determination of the parliament, that the succession *shall* continue in the usual course, seems tacitly to imply a power of new-modelling and altering it, in case the legislature had thought proper.

On queen Elizabeth's accession, her right is recognised in still stronger terms than her sister's; the parliament acknowledging[u], "that the queen's highness is, and in very deed, "and of most mere right ought to be, by the laws of God, "and the laws and statutes of this realm, our most lawful "and rightful sovereign liege lady and queen; and that her "highness is rightly, lineally, and lawfully descended and "come of the blood royal of this realm of England; in and "to whose princely person, and to the heirs of her body law-"fully to be begotten, after her, the imperial crown and dig-"nity of this realm doth belong." And in the same reign, by statute 13 Eliz. c. 1. we find the right of parliament to direct the succession of the crown asserted in the most explicit words. "If any person shall hold, affirm, or maintain, that "the common laws of this realm, not altered by parliament, "ought not to direct the right of the crown of England; or "that the queen's majesty, with and by the authority of par-"liament, is not able to make laws and statutes of sufficient "force and validity, to limit and bind the crown of this realm, "and the descent, limitation, inheritance, and government "thereof; such person, so holding, affirming, or "maintaining, shall, during the life of the queen, be [208] "guilty of high treason; and after her decease shall "be guilty of a misdemesnor, and forfeit his goods and chat-"tels."

On the death of queen Elizabeth, without issue, the line of Henry VIII. became extinct. It therefore became necessary to recur to the other issue of Henry VII. by Elizabeth of York his queen; whose eldest daughter Margaret having

[u] Stat. 1 Eliz. c. 3.

married James IV. king of Scotland, king James the sixth of Scotland, and of England the first, was the lineal descendant from that alliance. So that in his person, as clearly as in Henry VIII, centered all the claims of different competitors, from the conquest downwards, he being indisputably the lineal heir of the conqueror. And, what is still more remarkable, in his person also centred the right of the Saxon monarchs, which had been suspended from the conquest till his accession. For, as was formerly observed, Margaret the sister of Edgar Atheling, the daughter of Edward the outlaw, and grand-daughter of king Edmund Ironside, was the person in whom the hereditary right of the Saxon kings, supposing it not abolished by the conquest, resided. She married Malcolm king of Scotland; and Henry II, by a descent from Matilda their daughter, is generally called the restorer of the Saxon line. But it must be remembered, that Malcolm by his Saxon queen had sons as well as daughters; and that the royal family of Scotland from that time downwards were the offspring of Malcolm and Margaret. Of this royal family king James the first was the direct lineal heir, and therefore united in his person every possible claim by hereditary right to the English as well as Scottish throne, being the heir both of Egbert and William the conqueror.

And it is no wonder that a prince of more learning than wisdom, who could deduce an hereditary title for more than eight hundred years, should easily be taught by the flatterers of the times, to believe there was something divine in this right, and that the finger of Providence was visible in its preser-
[209] vation. Whereas, though a wise institution, it was clearly a human institution; and the right inherent in him no natural, but a positive right. And in this and no other light was it taken by the English parliament (2); who by

(2) It is difficult to say in what light it was considered by that parliament, which, in the preamble to the statute, declares with nauseous pedantry, that "upon the knees of their hearts they agnize their

statute 1 Jac. I. c. 1. did "recognise and acknowledge, that "immediately upon the dissolution and decease of Elizabeth "late queen of England, the imperial crown thereof did by "inherent birthright, and lawful and undoubted succession, "descend and come to his most excellent majesty, as being "lineally, justly, and lawfully, next and sole heir of the blood "royal of this realm." Not a word here of any right immediately derived from heaven: which, if it existed any where, must be sought for among the *aborigines* of the island, the ancient Britons; among whose princes indeed some have gone to search it for him[w].

But wild and absurd as the doctrine of divine right most undoubtedly is, it is still more astonishing, that when so many human hereditary rights had centred in this king, his son and heir king Charles the first should be told by those infamous judges who pronounced his unparalleled sentence, that he was an elective prince; elected by his people, and therefore accountable to them, in his own proper person, for his conduct. The confusion, instability, and madness, which followed the fatal catastrophe of that pious and unfortunate prince, will be a standing argument in favor of hereditary monarchy to all future ages; as they proved at last to the then deluded people: who, in order to recover that peace and happiness which for twenty years together they had lost, in a solemn parliamentary convention of the states restored the right heir of the crown. And in the proclamation for that purpose, which was drawn up and attended by both houses[x], they declared, "that, according to their duty and allegiance, "they did heartily, joyfully, and unanimously acknowledge

w Elizabeth of York, the mother of queen Margaret of Scotland, was heiress of the house of Mortimer. And Mr. Carte observes, that the house of Mortimer, in virtue of its descent from Gladys only sister to Lewellin ap Jorwerth the great, had the true right to the principality of Wales. Hist. Eng. iii. 705.

x Com. Journ. 8 May 1660.

"constant faith, obedience, and loyalty to his majesty and his royal "progeny."

"and proclaim, that immediately upon the decease of our "late sovereign lord king Charles, the imperial crown of "these realms did by inherent birthright and lawful and "undoubted succession descend and come to his most excel- "lent majesty Charles the second, as being lineally, justly, "and lawfully, next heir of the blood royal of this realm: "and thereunto they most humbly and faithfully did submit "and oblige themselves, their heirs, and posterity for ever."

THUS I think it clearly appears, from the highest authority this nation is acquainted with, that the crown of England hath been ever an hereditary crown; though subject to limitations by parliament. The remainder of this chapter will consist principally of those instances, wherein the parliament has asserted or exercised this right of altering and limiting the succession; a right which, we have seen, was before exercised and asserted in the reigns of Henry IV, Henry VII, Henry VIII, queen Mary, and queen Elizabeth.

THE first instance, in point of time, is the famous bill of exclusion, which raised such a ferment in the latter end of the reign of king Charles the second. It is well known that the purport of this bill was to have set aside the king's brother and presumptive heir, the duke of York, from the succession, on the score of his being a papist; that it passed the house of commons, but was rejected by the lords; the king having also declared beforehand, that he never would be brought to consent to it. And from this transaction we may collect two things: 1. That the crown was universally acknowledged to be hereditary; and the inheritance indefeasible unless by parliament: else it had been needless to prefer such a bill. 2. That the parliament had a power to have defeated the inheritance: else such a bill had been ineffectual. The commons acknowledged the hereditary right then subsisting; and the lords did not dispute the power, but merely the propriety, of an exclusion. However, as the bill took no effect, king James the second succeeded to the throne of his ancestors: and might have enjoyed it during the remainder of his life,

but for his own infatuated conduct, which (with other concurring circumstances) brought on the revolution in 1688.

THE true ground and principle, upon which that [211] memorable event proceeded, was an entirely new case in politics, which had never before happened in our history; the abdication of the reigning monarch, and the vacancy of the throne thereupon. It was not a defeasance of the right of succession, and a new limitation of the crown, by the king and both houses of parliament: it was the act of the nation alone, upon a conviction that there was no king in being. For in a full assembly of the lords and commons, met in a convention upon the supposition of this vacancy, both houses[y] came to this resolution; "that king James the second, having endeavoured to subvert the constitution of the kingdom, "by breaking the original contract between king and people; "and, by the advice of jesuits and other wicked persons, having violated the fundamental law; and having withdrawn "himself out of this kingdom; has abdicated the government, and that the throne is thereby vacant." Thus ended at once, by this sudden and unexpected vacancy of the throne, the old line of succession; which from the conquest had lasted above six hundred years, and from the union of the heptarchy in king Egbert almost nine hundred. The facts themselves thus appealed to, the king's endeavour to subvert the constitution by breaking the original contract, his violation of the fundamental laws, and his withdrawing himself out of the kingdom, were evident and notorious: and the consequences drawn from these facts (namely, that they amounted to an abdication of the government; which abdication did not affect only the person of the king himself, but also all his heirs, and rendered the throne absolutely and completely vacant) it belonged to our ancestors to determine (3).

y Com. Journ. 7 Feb. 1688.

(3) The convention in Scotland drew the same conclusion, viz. the vacancy of the throne, from premises and in language much more bold and intelligible. The mystery of the declaration of the English con-

For, whenever a question arises between the society at large and any magistrate vested with powers originally delegated by that society, it must be decided by the voice of the society itself: there is not upon earth any other tribunal to resort to. And that these consequences were fairly deduced from these facts, our ancestors have solemnly determined, in a full parliamentary convention representing the whole society. The reasons upon which they decided may [212] be found at large in the parliamentary proceedings of the times; and may be matter of instructive amusement for us to contemplate, as a speculative point of history. But care must be taken not to carry this inquiry farther, than merely for instruction or amusement. The idea, that the consciences of posterity were concerned in the rectitude of their ancestors' decisions, gave birth to those dangerous political heresies, which so long distracted the state, but at length are all happily extinguished. I therefore rather choose to consider this great political measure upon the solid footing of authority, than to reason in its favor from its justice, moderation, and expedience: because that might imply a right of dissenting or revolting from it, in case we should think it to have been unjust, oppressive, or inexpedient. Whereas, our ancestors having most indisputably a competent jurisdiction to decide this great and important question, and having in fact decided it, it is now become our duty at this distance of time to acquiesce in their determination;

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vention, betrays that timidity which it was intended to conceal. "The "estates of the kingdom of Scotland find and declare, that king James "seventh, being a professed papist, did assume the royal power, and "acted as a king, without ever taking the oath required by law; and "had, by the advice of evil and wicked counsellors, invaded the fun- "damental constitution of this kingdom, and altered it from a legal and "limited monarchy to an arbitrary despotic power; and had governed "the same to the subversion of the protestant religion and violation of "the laws and liberties of the nation, inverting all the ends of govern- "ment, whereby he had *forefaulted* the crown, and the throne was "become vacant." *Tyndal*, 71. *Fol. Cont. of Rapin.*

being born under that establishment which was built upon this foundation, and obliged by every tie, religious as well as civil, to maintain it.

But, while we rest this fundamental transaction, in point of authority, upon grounds the least liable to cavil, we are bound both in justice and gratitude to add, that it was conducted with a temper and moderation which naturally arose from its equity; that, however it might in some respects go beyond the letter of our ancient laws, (the reason of which will more fully appear hereafter[z],) it was agreeable to the spirit of our constitution, and the rights of human nature; and that though in other points (owing to the peculiar circumstances of things and persons) it was not altogether so perfect as might have been wished, yet from thence a new æra commenced, in which the bounds of prerogative and liberty have been better defined, the principles of government more thoroughly examined and understood, and the rights of the subject more explicitly guarded by legal provisions, than in any other period of the English history. In particular it is worthy observation that the convention, in this [213] their judgment, avoided with great wisdom the wild extremes into which the visionary theories of some zealous republicans would have led them. They held that this misconduct of king James amounted to an *endeavour* to subvert the constitution; and not to an actual subversion, or total dissolution, of the government, according to the principles of Mr. Locke[a]: which would have reduced the society almost to a state of nature; would have levelled all distinctions of honor, rank, offices, and property; would have annihilated the sovereign power, and in consequence have repealed all positive laws; and would have left the people at liberty to have erected a new system of state upon a new foundation of polity. They therefore very prudently voted it to amount to no more than an abdication of the government, and a consequent vacancy of the throne; whereby the government was allowed to subsist, though the executive magistrate was

z See chap. 7. a on Gov. p. 2, c. 19.

gone, and the kingly office to remain, though king James was no longer king[b]. And thus the constitution was kept entire; which upon every sound principle of government must otherwise have fallen to pieces, had so principal and constituent a part as the royal authority been abolished, or even suspended.

THIS single postulatum, the vacancy of the throne, being once established, the rest that was then done followed almost of course. For, if the throne be at any time vacant; (which may happen by other means besides that of abdication; as if all the blood royal should fail, without any successor appointed by parliament;) if, I say, a vacancy by any means whatsoever should happen, the right of disposing of this vacancy seems naturally to result to the lords and commons, the trustees and representatives of the nation (4). For there are no other hands in which it can so properly be intrusted; and there is a necessity of its being intrusted somewhere, else the whole frame of government must be dissolved and perish. The lords and commons having therefore determined this main fundamental article, that there was a vacancy of the throne, they proceeded to fill up that vacancy in such manner [214] as they judged the most proper. And this was done by their declaration of 12 February 1688[c], in the following manner: "that William and Mary, prince and "princess of Orange, be, and be declared king and queen, to "hold the crown and royal dignity during their lives, "and the life of the survivor of them; and that the sole and "full exercise of the regal power be only in, and executed

b Law of forfeit. 118, 119. c Com. Journ. 12 Feb. 1688.

(4) The preamble to the bill of rights expressly declares, that "the "lords spiritual and temporal, and commons, assembled at Westmin-"ster lawfully, fully and freely represent all the estates of the people of "this realm." The lords are not less the trustees and guardians of their country, than the members of the house of commons. It was justly said, when the royal prerogatives were suspended during his majesty's illness, "that the two houses of parliament were the organs "by which the people expressed their will."

"by, the said prince of Orange, in the names of the said "prince and princess, during their joint lives: and after their "deceases the said crown and royal dignity to be to the heirs "of the body of the said princess; and for default of such "issue to the princess Anne of Denmark and the heirs of "her body; and for default of such issue to the heirs of the "body of the said prince of Orange."

PERHAPS, upon the principles before established, the convention might (if they pleased) have vested the regal dignity in a family entirely new, and strangers to the royal blood: but they were too well acquainted with the benefits of hereditary succession, and the influence which it has by custom over the minds of the people, to depart any farther from the ancient line than temporary necessity and self-preservation required. They therefore settled the crown, first on king William and queen Mary, king James's eldest daughter, for their joint lives: then on the survivor of them; and then on the issue of queen Mary: upon failure of such issue, it was limited to the princess Anne, king James's second daughter, and her issue; and lastly, on failure of that to the issue of king William, who was the grandson of Charles the first, and nephew as well as son-in-law of king James the second, being the son of Mary his eldest sister. This settlement included all the protestant posterity of king Charles I, except such other issue as king James might at any time have, which was totally omitted, through fear of a popish succession. And this order of succession took effect accordingly.

THESE three princes therefore, king William, queen Mary, and queen Anne, did not take the crown by hereditary right or *descent*, but by way of donation or *purchase* as the lawyers call it; by which they mean any method of [215] acquiring an estate otherwise than by descent. The new settlement did not merely consist in excluding king James, and the person pretended to be prince of Wales, and then suffering the crown to descend in the old hereditary channel: for the usual course of descent was in some instances

broken through; and yet the convention still kept it in their eye, and paid a great, though not total, regard to it. Let us see how the succession would have stood, if no abdication had happened, and king James had left no other issue than his two daughters queen Mary and queen Anne. It would have stood thus: queen Mary and her issue; queen Anne and her issue; king William and his issue. But we may remember, that queen Mary was only nominally queen, jointly with her husband king William, who alone had the regal power; and king William was personally preferred to queen Anne, though his issue was postponed to hers. Clearly therefore these princes were successively in possession of the crown by a title different from the usual course of descent.

It was towards the end of king William's reign, when all hopes of any surviving issue from any of these princes died with the duke of Gloucester, that the king and parliament thought it necessary again to exert their power of limiting and appointing the succession, in order to prevent another vacancy of the throne: which must have ensued upon their deaths, as no farther provision was made at the revolution, than for the issue of queen Mary, queen Anne, and king William. The parliament had previously by the statute of 1 W. & M. st. 2. c. 2. enacted, that every person who should be reconciled to, or hold communion with, the see of Rome, should profess the popish religion, or should marry a papist, should be excluded and for ever incapable to inherit, possess, or enjoy the crown; and that in such case the people should be absolved from their allegiance, and the crown should descend to such persons, being protestants, as would have inherited the same, in case the person so reconciled, holding communion, professing, or marrying, were naturally dead.

To act therefore consistently with themselves, and
[216] at the same time pay as much regard to the old hereditary line as their former resolutions would admit, they turned their eyes on the princess Sophia, electress and dutchess dowager of Hanover, the most accomplished princess

of her age[e]. For, upon the impending extinction of the protestant posterity of Charles the first, the old law of regal descent directed them to recur to the descendants of James the first; and the princess Sophia, being the youngest daughter of Elizabeth queen of Bohemia, who was the daughter of James the first, was the nearest of the ancient blood royal, who was not incapacitated by professing the popish religion. On her therefore, and the heirs of her body, being protestants, the remainder of the crown, expectant on the death of king William and queen Anne without issue, was settled by statute 12 and 13 W. III. c. 2. And at the same time it was enacted, that whosoever should hereafter come to the possession of the crown should join in the communion of the church of England as by law established.

THIS is the last limitation of the crown that has been made by parliament: and these several actual limitations, from the time of Henry IV. to the present, do clearly prove the power of the king and parliament to new-model or alter the succession. And indeed it is now again made highly penal to dispute it: for by the statute 6 Ann. c. 7. it is enacted, that if any person maliciously, advisedly, and directly, shall maintain, by writing or printing, that the kings of this realm with the authority of parliament are not able to make laws to bind the crown and the descent thereof, he shall be guilty of high treason; or if he maintains the same by only preaching, teaching, or advised speaking, he shall incur the penalties of a *praemunire*.

THE princess Sophia dying before queen Anne, the inheritance thus limited descended on her son and heir king George the first; and, having on the death of the queen taken effect in his person, from him it descended to his late majesty king George the second; and from him to his grandson and heir, our present gracious sovereign, king George the third.

HENCE it is easy to collect, that the title to the crown is

e Sandford in his genealogical history, published A. D. 1677, speaking (page 536) of the princesses Elizabeth, Louisa, and Sophia, daughters of the queen of Bohemia, says, the first was reputed the most learned, the second the greatest artist, and the last one of the most accomplished ladies in Europe.

at present hereditary, though not quite so absolutely hereditary as formerly: and the common stock or ancestor, from whom the descent must be derived, is also different. Formerly the common stock was king Egbert; then William the conqueror; afterwards in James the first's time the two common stocks united, and so continued till the vacancy of the throne in 1688: now it is the princess Sophia, in whom the inheritance was vested by the new king and parliament. Formerly the descent was absolute, and the crown went to the next heir without any restriction: but now, upon the new settlement, the inheritance is conditional; being limited to such heirs only, of the body of the princess Sophia, as are protestant members of the church of England, and are married to none but protestants.

And in this due medium consists, I apprehend, the true constitutional notion of the right of succession to the imperial crown of these kingdoms. The extremes between which it steers, are each of them equally destructive of those ends for which societies were formed and are kept on foot. Where the magistrate, upon every succession, is elected by the people, and may by the express provision of the laws be deposed (if not punished) by his subjects, this may sound like the perfection of liberty, and look well enough when delineated on paper; but in practice will be ever productive of tumult, contention, and anarchy. And, on the other hand, divine indefeasible hereditary right, when coupled with the doctrine of unlimited passive obedience, is surely of all constitutions the most thoroughly slavish and dreadful. But when such an hereditary right, as our laws have created and vested in the royal stock, is closely interwoven with those liberties, which, we have seen in a former chapter, are equally the inheritance of the subject; this union will form a constitution, in theory the most beautiful of any, in practice the most approved, and, I trust, in duration the most permanent. It was the duty of an expounder of our laws to lay this constitution before the student in its true and genuine light: it is the duty of every good Englishman to understand, to revere, to defend it.

CHAPTER THE FOURTH.

OF THE KING'S ROYAL FAMILY.

THE first and most considerable branch of the king's royal family, regarded by the laws of England, is the queen.

THE queen of England is either queen *regent*, queen *consort*, or queen *dowager*. The queen *regent*, *regnant*, or *sovereign*, is she who holds the crown in her own right; as the first (and perhaps the second) queen Mary, queen Elizabeth, and queen Anne; and such an one has the same powers, prerogatives, rights, dignities, and duties, as if she had been a king. This was observed in the entrance of the last chapter, and is expressly declared by statute 1 Mar. I. st. 3. c. 1. (1). But the queen *consort* is the wife of the reigning king; and she, by virtue of her marriage, is participant of divers prerogatives above other women[a].

AND, first, she is a public person, exempt and distinct from the king; and not, like other married women, so closely con-

a Finch. L. 86.

(1) Mary being the first queen that had sat upon the English throne, this statute was passed, as it declares, for "the extinguishment of the "doubt and folly of malicious and ignorant persons," who might be induced to think that a queen could not exercise all the prerogatives of a king.

nected as to have lost all legal or separate existence so long as the marriage continues. For the queen is of ability to purchase lands, and to convey them, to make leases, to grant copyholds, and do other acts of ownership, without the concurrence of her lord; which no other married woman can do[b]: a privilege as old as the Saxon æra[c]. She is also capable of taking a grant from the king, which no other wife is from her husband; and in this particular she agrees with the *Augusta*, or *piissima regina conjux divi imperatoris* of the Roman laws; who, according to Justinian[d], was [219] equally capable of making a grant to, and receiving one from, the emperor. The queen of England hath separate courts and offices distinct from the king's, not only in matters of ceremony, but even of law; and her attorney and solicitor general are entitled to a place within the bar of his majesty's courts, together with the king's counsel[e]. She may likewise sue and be sued alone, without joining her husband. She may also have a separate property in goods as well as lands, and has a right to dispose of them by will. In short, she is in all legal proceedings looked upon as a feme sole, and not as a feme covert; as a single, not as a married woman[f]. For which the reason given by sir Edward Coke is this: because the wisdom of the common law would not have the king (whose continual care and study is for the public, and *circa arduα regni*) to be troubled and disquieted on account of his wife's domestic affairs; and therefore it vests in the queen a power of transacting her own concerns, without the intervention of the king, as if she was an unmarried woman.

The queen hath also many exemptions, and minute prerogatives. For instance: she pays no toll[g]; nor is she liable to any amercement in any court[h]. But in general,

b 4 Rep. 23.
c Seld. Jan. Angl. 1. 42.
d Cod. 5. 16. 26.
e Seld. tit. hon. 1. 6. 7.
f Finch. L. 86. Co. Litt. 133.
g Co. Litt. 133.
h Finch. L. 185.

unless where the law has expressly declared her exempted, she is upon the same footing with other subjects; being to all intents and purposes the king's subject, and not his equal: in like manner as, in the imperial law, "*Augusta legibus* "*soluta non est*[i]."

THE queen hath also some pecuniary advantages, which form her a distinct revenue: as, in the first place, she is entitled to an ancient perquisite called queen-gold, or *aurum reginae*; which is a royal revenue, belonging to every queen consort during her marriage with the king, and due from every person who hath made a voluntary offering or fine to the king, amounting to ten marks or upwards, for and in consideration of any privileges, grants, licenses, pardons, or other matter of royal favor conferred upon [220] him by the king: and it is due in the proportion of one tenth part more, over and above the entire offering or fine made to the king; and becomes an actual debt of record to the queen's majesty by the mere recording of the fine[k]. As, if an hundred marks of silver be given to the king for liberty to take in mortmain, or to have a fair, market, park, chase, or free-warren: there the queen is entitled to ten marks in silver, or (what was formerly an equivalent denomination) to one mark in gold, by the name of queen-gold, or *aurum reginae*[l]. But no such payment is due for any aids or subsidies granted to the king in parliament or convocation; nor for fines imposed by courts on offenders, against their will; nor for voluntary presents to the king, without any consideration moving from him to the subject; nor for any sale or contract whereby the present revenues or possessions of the crown are granted away or diminished[m].

THE original revenue of our ancient queens, before and soon after the conquest, seems to have consisted in certain reservations or rents out of the demesne lands of the crown,

i Ff. 1. 3. 31.
k Pryn. Aur. Reg. 2.
l 12 Rep. 21. 4 Inst. 358.
m Ibid. Pryn. 6. Madox. hist. exch. 282.

which were expressly appropriated to her majesty, distinct from the king. It is frequent in doomsday book, after specifying the rent due to the crown, to add likewise the quantity of gold or other renders reserved to the queen[n]. These were frequently appropriated to particular purposes; to buy wool for her majesty's use[o], to purchase oil for her lamps[p], or to furnish her attire from head to foot[q], which was frequently very costly, as one single robe in the fifth year of [221] Henry II. stood the city of London in upwards of fourscore pounds[r]. A practice somewhat similar to that of the eastern countries, where whole cities and provinces were specifically assigned to purchase particular parts of the queen's apparel[s]. And, for a farther addition to her income, this duty of queen-gold is supposed to have been originally granted; those matters of grace and favor, out of which it arose, being frequently obtained from the crown by the powerful intercession of the queen. There are traces of its payment, though obscure ones, in the book of doomsday and in the great pipe-roll of Henry the first[t]. In the reign of Henry the second the manner of collecting it appears to have been well understood, and it forms a distinct head in the ancient dialogue of the exchequer[u] written in the time of that prince, and usually attributed to Gervase of Tilbury. From that time downwards it was regularly claimed and enjoyed by all the queen consorts of England till the death of Henry VIII; though after the accession of the Tudor family

n Bedefordscire Maner. Lestone redd. per annum xxii lib. etc.; ad opus reginae ii uncias auri. Herefordscire. In Lene, etc. consuetud. ut praepositus manerii veniente pomina sua (regina) in maner. praesentaret ei xviii oras denar. ut esset ipsa laeto animo. Pryn. Append. to Aur. Reg. 2, 3.

o Causa coadunandi lanam reginae. Domesd. ibid.

p Civitas Lundon. Pro oleo ad lamp. ad reginae. (Mag. rot. pip. temp. Hen. II. ibid.)

q Vicecomes Berkescire, xvi l. pro cappa reginae. (Mag. rot. pip. 19.—22 Hen. II. ibid.) Civitas Lund. corduhanario reginae xx s. (Mag. rot. 2 Hen. II. Madox hist. exch. 419.)

r Pro roba ad opus reginae, quater xx l. and vi s. viii d. (Mag. rot. 5 Hen. II. ibid. 250.)

s Solere aiunt barbaros reges Persarum ac Syrorum—uxoribus civitates attribuere, hoc modo; haec civitas mulieri redimiculum praebeat, haec in collum, haec in crines, etc. (Cic. in Verrem, lib. 3. cap. 33.)

t See Madox Disceptat. epistolar. 74. Pryn. Aur. Reg. Append. 5.

u lib. 2. c. 26.

the collecting of it seems to have been much neglected: and, there being no queen consort afterwards till the accession of James I, a period of near sixty years, its very nature and quantity became then a matter of doubt: and being referred by the king to the chief justices and chief baron, their report of it was so very unfavorable[u], that his consort queen Anne (though she claimed it) yet never thought proper to exact it. In 1635, 11 Car. I, a time fertile of expedients for raising money upon dormant precedents in our old records, (of which ship-money was a fatal instance,) the king, at the petition of his queen, Henrietta Maria, issued out his writ[w] for levying it: but afterwards purchased it of his consort at the price of ten thousand pounds; finding it, perhaps, too trifling and troublesome to levy. And when afterwards, at the restoration, by the abolition of the mili- [222] tary tenures, and the fines that were consequent upon them, the little that legally remained of this revenue was reduced to almost nothing at all, in vain did Mr. Prynne, by a treatise which does honor to his abilities as a painful and judicious antiquary, endeavour to excite queen Catherine to revive this antiquated claim.

ANOTHER ancient perquisite belonging to the queen consort, mentioned by all our old writers[x], and, therefore only, worth notice, is this; that on the taking of a whale on the coasts, which is a royal fish, it shall be divided between the king and queen; the head only being the king's property, and the tail of it the queen's. "*De sturgione observetur, quod* "*rex illum habebit integrum: de balena vero sufficit, si rex* "*habeat caput, et regina caudam.*" The reasons of this whimsical division, as assigned by our ancient records[y], was to furnish the queen's wardrobe with whalebone (2).

u Mr. Prynne, with some appearance of reason, insinuates, that their researches were very superficial. (Aur. Reg. 125.)

w 19 Rym. Foed. 721.

x Bracton. l. 3. c. 3. Britton. c. 17. Flet. l. 1. c. 45 and 46.

y Pryn. Aur. Reg. 127.

(2) The reason is more whimsical than the division, for the whalebone lies entirely in the head.

But farther: though the queen is in all respects a subject, yet, in point of the security of her life and person, she is put on the same footing with the king. It is equally treason (by the statute 25 Edw. III.) to compass or imagine the death of our lady the king's companion, as of the king himself: and to violate, or defile the queen consort, amounts to the same high crime; as well in the person committing the fact, as in the queen herself, if consenting. A law of Henry the eighth[z] made it treason also for any woman, who was not a virgin, to marry the king without informing him thereof: but this law was soon after repealed (3), it trespassing too strongly, as well on natural justice, as female modesty. If however the queen be accused of any species of treason, she shall (whether consort or dowager) be tried by the peers of parliament, as queen Ann Boleyn was in 28 Hen. VIII. (4).

The husband of a queen regnant, as prince George of Denmark was to queen Anne, is her subject; and may be guilty of high treason against her: but, in the instance of

z Stat. 33 Hen. VIII. c. 21.

(3) This was a clause in the act, which attainted queen Catherine Howard and her accomplices for her incontinence; but it was not repealed till the 1 Ed. VI. c. 12. which abrogated all treasons created since the memorable statute in the 25 Ed. III.

(4) Ann Boleyn was convicted of high treason in the court of the lord high-steward. One of the charges against this unhappy queen was, that she had said, "that the king never had had her heart;" a declaration, if made, in which there was probably more truth than discretion; but this was adjudged to be a slander of her own issue, and therefore high treason, according to a statute which had been passed about two years before for her honor and protection. *Harg. St. Tr.* 11 vol. p. 10.

Articles of impeachment were prepared against queen Catherine Parr for heresy in presuming to controvert the theological doctrines of the king; but by her dexterity and address, she baffled the designs of her enemies, and regained the affections of that capricious monarch. 4 *Hume*, 259.

Articles of impeachment for high treason were exhibited against Henrietta queen of Car. I. from which she saved herself by an escape to France. 7 *Hume*, 10.

conjugal infidelity, he is not subjected to the same penal restrictions. For which the reason seems to be, that, if a queen consort is unfaithful to the royal bed, this may debase or bastardize the heirs to the crown; but no such danger can be consequent on the infidelity of the husband to a queen regnant.

A QUEEN *dowager* is the widow of the king, and as such enjoys most of the privileges belonging to her as queen consort. But it is not high treason to conspire her death, or to violate her chastity, for the same reason as was before alleged, because the succession to the crown is not thereby endangered. Yet still, *jure dignitate regali*, no man can marry a queen dowager without special license from the king, on pain of forfeiting his lands and goods. This sir Edward Coke[a] tells us was enacted in parliament in 6 Hen. VI, though the statute be not in print (5). But she, though an alien born, shall still be entitled to dower after the king's demise, which no other alien is[b]. A queen dowager, when married again to a subject, doth not lose her regal dignity, as peeresses dowager do their peerage when they marry commoners. For Catherine, queen dowager of Henry V, though she married a private gentleman, Owen ap Meredith ap Theodore, commonly called Owen Tudor; yet, by the name of Catherine queen of England, maintained an action against the bishop of Carlisle. And so, the queen dowager of Navarre marrying with Edmond earl of Lancaster, brother to king Edward the first, maintained an action of dower (after the death of her second husband) by the name of queen of Navarre[c].

THE prince of Wales, or heir apparent to the crown, and also his royal consort, and the princess royal, or eldest daughter of the king, are likewise peculiarly regarded by the laws.

a 2 Inst. 18. See Riley's Plac. Parl. 72. b Co. Litt. 31. c 2 Inst. 50.

(5) Mr. Hargrave, in a note to Co. Litt. 133. says, that no such statute can be found. Lord Coke there refers to it by 8 Hen. VI. n° 7. in 2 Inst. 18. by 6 Hen. VI. n° 41. In Riley's Plac. Parl. it is called 2 Hen. VI.

For, by statute 25 Edw. III, to compass or conspire the death of the former, or to violate the chastity of either of the latter, are as much high treason as to conspire the death of the king, or violate the chastity of the queen. And this upon the same reason, as was before given; because the prince of Wales is next in succession to the crown, and to violate his wife might taint the blood royal with bastardy: and the eldest daughter of the king is also alone inheritable to the [224] crown, on failure of issue male, and therefore more respected by the laws than any of her younger sisters (6); insomuch that upon this, united with other (feodal) principles, while our military tenures were in force, the king might levy an aid for marrying his eldest daughter, and her only. The heir apparent (7) to the crown is usually made prince of Wales and earl of Chester (8) by special creation,

(6) This statute perhaps was not meant to be extended to the princess royal when she had younger brothers living, for the issue of their wives must inherit the crown before the issue of the princess royal, yet their chastity is not protected by the statute.

(7) This creation has not been confined to the heir apparent, for both queen Mary and queen Elizabeth were created by their father Henry VIII. princesses of Wales, each of them at the time (the latter after the illegitimation of Mary) being heir presumptive to the crown. 4 *Hume*, 113.

Edward II. was the first prince of Wales. When his father had subdued the kingdom of Wales, he promised the people of that country, upon condition of their submission, to give them a prince who had been born among them, and who could speak no other language.

Upon their acquiescence with this deceitful offer, he conferred the principality of Wales upon his second son Edward, then an infant. Edward, by the death of his eldest brother Alfonso, became heir to the crown, and from that time, this honor has been appropriated only to the eldest sons or eldest daughters of the kings of England. 2 *Hume*, 243.

(8) Selden tells us, "that the earldom of Chester was once also a "principality, erected into that title by parliament in 21 Rich. II, "wherein it was also ordained that it should be given to the king's "eldest son. But that whole parliament was repealed in the first of "Hen. IV, although the earldom hath usually been since given with "the principality of Wales." *Seld. Tit. of Hon.* 2. *c.* 5. *s.* 1.

and investiture (9); but being the king's eldest son (10), he is by inheritance duke of Cornwall, without any new creation[d].

d 8 Rep. 1. Seld. tit. of hon. 2. 5.

(9) That is, by letters patent under the great seal of England.

(10) Lord Coke, in the Prince's case, in the 8th Report, has expressly advanced, that the dutchy of Cornwall cannot descend, upon the death of the king's first-born son, to the eldest then living. But this position is beyond all controversy erroneous. Lord Hardwicke, in Lomax v. Holmden, 1 Ves. 294. has observed, "That the eldest son of the king of "England takes the dutchy of Cornwall as *primogenitus;* although lord "Coke at the end of the Prince's case says otherwise. But this was "not the point there, being only an observation of his own, and has "ever since been held a mistake of that great man. He was also mis-"taken in the fact, in saying that Henry VIII. was not duke of Corn-"wall, because not *primogenitus;* for lord Bacon in his history of "Henry VII. affirms the contrary, that the dukedom devolved to him "upon the death of Arthur; and this is by a great lawyer, and who "must have looked into it, as he was then attorney or solicitor general." But this point was solemnly determined in 1613, upon the death of prince Henry the eldest son of James I. in the case of the dutchy of Cornwall, the report of which is inserted at length in Collins's Proceedings on Baronies, p. 148. In which it was resolved that prince Charles, the king's second son, was duke of Cornwall by inheritance.

It is more strange that lord Coke should have fallen into this mistake, as the contrary appears from almost every record upon the subject.

In the 5th Henry IV. the second reign after the creation of the dutchy, there is a record, in which prince Henry makes a grant of part of the dutchy lands to the countess of Huntingdon, and the record states, that because the prince is within age, so that in law his grant is not effectual to give a sure estate, he shall pledge his faith before the king and all the lords of parliament, that when he attains his full age, he shall grant a sure estate against himself and his heirs; and that his three brothers, Thomas, John, and Humphrey, shall in like manner pledge their faith to confirm the same estate, *si issint aveigne, que Dieux defende, que le dit Duche unques devient en lours maine,* if it should so happen, which God forbid, that the said dutchy should ever come into their hands, and thereupon they all made a promise and took an oath to that effect. Rot. Parl. 5 Hen. IV. No. 4.

But the second son would not succeed to the dukedom, if his elder brother left issue; in that case it would revert to the crown. The duke

The rest of the royal family may be considered in two different lights, according to the different senses in which the term, *royal family*, is used. The larger sense includes all those, who are by any possibility inheritable to the crown. Such, before the revolution, were all the descendants of William the conqueror; who had branched into an amazing extent, by intermarriages with the ancient nobility. Since the revolution and act of settlement, it means the protestant issue of the princess Sophia; now comparatively few in number, but which in process of time may possibly be as largely diffused. The more confined sense includes only those, who are within a certain degree of propinquity to the reigning prince, and to whom therefore the law pays an extraordinary

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of Cornwall must be both the king's eldest son and heir apparent to the crown; this appears from a great variety of records, *que les fitz eisnes des rois d'Engleterre, c'est assavoir, ceux qui serroient heirs proscheins du roialme d'Engleterre, fuissent duc de Cornewaile.* Rot. Parl. 9 Hen. V. No. 20.

In a charter of livery of the dutchy by Ed. IV. to his eldest son prince Edward, recited in the rolls of parliament, the following sentence is part of the preamble: *Filii primogeniti regum Angliæ primo nativitatis suæ die majoris atque perfectæ præsumuntur ætatis, sic quod liberationem dicti ducatûs eo tunc à nobis petere valeant atque de jure obtinere debeant ac ei viginti et unius annorum ætatis plenæ fuissent.* Rot. Parl. 12 Ed. IV. No. 14. From this and from other authorities it follows, that a duke of Cornwall is born of full age, or is subject to no minority with respect to his enjoyment of the possessions annexed to the dukedom.

This is a strange species of inheritance, and perhaps is the only mode of descent which depends upon the authority of a statute. In the Prince's case, reported by lord Coke, the question was, whether the original grant to Edward the Black Prince, who was created in the 11th of Ed. III. duke of Cornwall, and who was the first duke in England after the duke of Normandy, had the authority of parliament, or was an honor conferred by the king's charter alone? If the latter, the limitation would have been void, as nothing less than the power of parliament can alter the established rules of descent. But notwithstanding it is in the form of a charter, it was held to be an act of the legislature. It concludes, *per ipsum regem et totum concilium in parliamento.*

regard and respect: but, after that degree is past, they fall into the rank of ordinary subjects, and are seldom considered any farther, unless called to the succession upon failure of the nearer lines. For, though collateral consanguinity is regarded indefinitely, with respect to inheritance or succession, yet it is and can only be regarded within some certain limits in any other respect, by the natural constitution of things and the dictates of positive law[e].

THE younger sons and daughters of the king, and other branches of the royal family, who are not in the immediate line of succession, were therefore little farther regarded by the ancient law, than to give them to a certain degree precedence before all peers and public officers, as well ecclesiastical as temporal. This is done by the statute 31 Hen. VIII. c. 10. which enacts, that no person, except the king's [225] children, shall presume to sit or have place at the side of the cloth of estate in the parliament chamber; and that certain great officers therein named shall have precedence above all dukes, except only such as shall happen to be the king's son, brother, uncle, nephew (which sir Edward Coke[f] explains to signify grandson or *nepos*), or brother's or sister's son. Therefore, after these degrees are past, peers or others of the *blood royal* are entitled to no place or precedence except what belongs to them by their personal rank or dignity. Which made sir Edward Walker complain[g], that by the hasty creation of prince Rupert to be duke of Cumberland, and of the earl of Lenox to be duke of that name, previous to the creation of king Charles's second son, James, to be duke of York, it might happen that their grandsons would have precedence of the grandsons of the duke of York.

INDEED, under the description of the king's *children* his *grandsons* are held to be included, without having recourse to sir Edward Coke's interpretation of *nephew:* and therefore when his late majesty king George II. created his grandson

e See essay on collateral consanguinity, in Law-tracts, 4to. Oxon. 1771.

f 4 Inst. 362.

g Tracts, p. 301.

Edward, the second son of Frederick prince of Wales deceased, duke of York, and referred it to the house of lords to settle his place and precedence, they certified[h] that he ought to have place next to the late duke of Cumberland, the then king's youngest son; and that he might have a seat on the left hand of the cloth of estate. But when, on the accession of his present majesty, those royal personages ceased to take place as the *children*, and ranked only as the *brother* and *uncle*, of the king, they also left their seats on the side of the cloth of estate: so that when the duke of Gloucester, his majesty's second brother, took his seat in the house of peers[i], he was placed on the upper end of the earl's bench (on which the dukes usually sit) next to his royal highness the duke of York. And in 1718, upon a question referred to all the judges by king George I, it was resolved by the opinion of ten against the other two, that the education and care of all the king's grandchildren while minors, did belong of right to his majesty as king of this realm, even during their father's life[k] (11). But they all agreed, that the care and approbation of their marriages, when grown up, belonged to the king their grandfather. And the judges have more recently concurred in opinion[l], that this care and approbation extend also to the presumptive heir of the crown; though to what other branches of the royal family the same did extend they did not find precisely determined. The most frequent instances of the crown's interposition go no farther than nephews and nieces[m]; but

h Lords' Journ. 24 Apr. 1760.
i Ibid. 10 Jan. 1765.
k Fortesc. Al. 401—440.
l Lords' Journ. 28 Feb. 1772.
m See (besides the instances cited in Fortescue Aland) for *brothers* and *sisters*; under king Edward III. 4 Rym. 392. 403. 411. 501. 508. 512. 549. 683: under Henry V, 9 Rym. 710, 711. 741: under Edward IV, 11 Rym. 564. 565. 590. 601: under Hen. VIII, 13 Rym. 249. 423: under Edw. VI, 7 St. Tr. 3. 8. For *nephews* and *nieces*; under Henry III, 1 Rym.

(11) The authorities and arguments of the two dissenting judges, Price and Eyre, are so full and cogent, that if this question had arisen before the judges were independent of the crown, one would have been inclined to have suspected the sincerity of the other ten, and the authority of the decision. See *Harg. St. Tr.* 11 vol. 295.

examples are not wanting of its reaching to more distant collaterals[n]. And the statute 6 Henry VI. before-mentioned, which prohibits the marriage of a queen dowager without the consent of the king, assigns this reason for it (12): "because the dis-"paragement of the queen shall give greater comfort and "example to other ladies of estate, who are of the *blood royal*, "more lightly to disparage themselves[o]." Therefore by the statute 28 Hen. VIII. c. 18. (repealed, among other statutes of treasons, by 1 Edw. VI. c. 12.) it was made high treason for any man to contract marriage with the king's children or reputed children, his sisters or aunts *ex parte paterna*, or the children of his brethren or sisters; being exactly the same degrees, to which precedence is allowed by the statute 31 Hen. VIII. beforementioned. And now, by statute 12 Geo. III. c. 11. no descendant of the body of king George II, (other than the issue of princesses married into foreign families) is capable of contracting matrimony, without the previous consent of the king signified under the great seal; and any marriage contracted without such consent is void. Provided, that such of the said descendants, as are above the age of twenty-five, may after a twelvemonth's notice given to the king's privy council, contract and solemnize marriage without the consent of the crown; unless both houses of parliament shall, before the expiration of the said year, expressly declare their disapprobation of such intended marriage. And all persons solemnizing, assisting, or being present at, any such prohibited marriage, shall incur the penalties of the statute of *praemunire*.

852: under Edward I, 2 Rym. 489: under Edward III, 5 Rym. 561: under Richard II, 7 Rym. 264: under Richard III, 12 Rym. 238. 244: under Henry VIII, 15 Rym. 26. 31.

n To *great nieces*; under Edward II, 3 Rym. 575. 644. To *first cousins*; under Edward III, 5 Rym. 177. To *second* and *third cousins*; under Edward III, 5 Rym. 739: under Richard II, 7 Rym. 225: under Henry VI, 10 Rym. 322: under Henry VII, 12 Rym. 329: under queen Elizabeth, Camd. Ann. A. D. 1562. To *fourth cousins*; under Henry VII, 12 Rym. 339. To the *blood royal* in general; under Richard II, 7 Rym. 787.

o Ril. plac. parl. 672.

(12) The occasion of this statute was the marriage of Catherine, mother to Hen. VI, with Owen Tudor, a private gentleman. See p. 223.

CHAPTER THE FIFTH.

OF THE COUNCILS BELONGING TO THE KING.

THE third point of view, in which we are to consider the king, is with regard to his councils. For, in order to assist him in the discharge of his duties, the maintenance of his dignity, and the exertion of his prerogative, the law hath assigned him a diversity of councils to advise with.

1. THE first of these is the high court of parliament, whereof we have already treated at large.

2. SECONDLY, the peers of the realm are by their birth hereditary counsellors of the crown, and may be called together by the king to impart their advice in all matters of importance to the realm, either in time of parliament, or, which hath been their principal use, when there is no parliament in being[a]. Accordingly Bracton[b], speaking of the nobility of his time, says they might properly be called "*consules, a consulendo; reges enim tales sibi associant ad consulendum.*" And in our law books[c] it is laid down, that peers are created for two reasons: 1. *Ad consulendum*, 2. *Ad defendendum, regem:* on which account the law gives them certain great and high privileges: such as freedom from arrests, *&c.* even when no parliament is sitting: because it intends, that they are always assisting the king with their counsel for the commonwealth, or keeping the realm in safety by their prowess and valor.

a Co. Litt. 110. b l. 1. c. 8. c 7 Rep. 34. 9 Rep. 46. 12 Rep. 96.

INSTANCES of conventions of the peers, to advise the king, have been in former times very frequent; though now fallen into disuse, by reason of the more regular meetings of parliament. Sir Edward Coke[d] gives us an extract of a record, 5 Hen. IV, concerning an exchange of lands between the king and the earl of Northumberland, wherein the value of each was agreed to be settled by advice of parliament, (if any should be called before the feast of saint Lucia,) or otherwise by advice of the grand council of peers which the king promises to assemble before the said feast, in case no parliament shall be called. Many other instances of this kind of meeting are to be found under our ancient kings: though the formal method of convoking them had been so long left off, that when king Charles I, in 1640, issued out writs under the great seal to call a great council of all the peers of England to meet and attend his majesty at York, previous to the meeting of the long parliament, the earl of Clarendon[e] mentions it as a new invention, not before heard of; that is, as he explains himself, so old, that it had not been practised in some hundreds of years. But, though there had not so long before been an instance, nor has there been any since, of assembling them in so solemn a manner, yet, in cases of emergency, our princes have at several times thought proper to call for and consult as many of the nobility as could easily be got together: as was particulaly the case with king James the second, after the landing of the prince of Orange; and with the prince of Orange himself, before he called that convention parliament, which afterwards called him to the throne.

BESIDES this general meeting, it is usually looked upon to be the right of each particular peer of the realm to demand an audience of the king, and to lay before him, with decency and respect, such matters as he shall judge of importance to the public weal. And therefore, in the reign of Edward II, it was made an article of impeachment in parliament against

[d] 1 Inst. 110. [e] Hist. b. 2.

the two Hugh Spencers, father and son, for which they were banished the kingdom, "that they by their evil covin would "not suffer the great men of the realm, the king's good "counsellors, to speak with the king, or to come near him; "but only in the presence and hearing of the said Hugh the "father and Hugh the son, or one of them, and at their will, "and according to such things as pleased them[f]."

3. A THIRD council belonging to the king, are, according to sir Edward Coke[g], his judges of the courts of law, for law matters. And this appears frequently in our statutes, particularly 14 Edw. III. c. 5. and in other books of law. So that when the king's council is mentioned generally, it must be defined, particularized, and understood, *secundum subjectam materiam:* and, if the subject be of a legal nature, then by the king's council is understood his council for matters of law: namely, his judges. Therefore when by statute 16 Ric. II. c. 5. it was made a high offence to import into this kingdom any papal bulles, or other processes from Rome; and it was enacted, that the offenders should be attached by their bodies, and brought before the king and his *council* to answer for such offence; here by the expression of the king's *council*, were understood the king's judges of his courts of justice, the subject matter being legal: this being the general way of interpreting the word, *council*[h].

4. BUT the principal council belonging to the king is his privy council, which is generally called, by way of eminence, *the council*. And this, according to sir Edward Coke's description of it[i], is a noble, honorable, and reverend assembly, of the king and such as he wills to be of his privy council, in the king's court or palace. The king's will is the sole constituent of a privy counsellor; and this also regulates their number, which of ancient time was twelve or thereabouts. Afterwards it increased to so large a number, that it was found inconvenient for secrecy and despatch; and therefore

f 4 Inst. 53.
g 1 Inst. 110.
h 3 Inst. 125.
i 4 Inst. 53.

king Charles the second in 1679 limited it to thirty: whereof fifteen were to be the principal officers of state, and those to be counsellors, *virtute officii*; and the other fifteen were composed of ten lords and five commoners of the king's choosing[k]. But since that time the number has been much augmented, and now continues indefinite (1). At the same time also the ancient office of lord president of the council was revived in the person of Anthony earl of Shaftsbury (2); an officer, that by the statute of 31 Hen. VIII. c. 10. has precedence next after the lord chancellor and lord treasurer.

PRIVY counsellors are *made* by the king's nomination, without either patent or grant; and, on taking the necessary oaths, they become immediately privy counsellors during the life of the king that chooses them, but subject to removal at his discretion.

As to the *qualifications* of members to sit at this board: any natural born subject of England is capable of being a member of the privy council; taking the proper oaths for security of the government, and the test for security of the church.

k Temple's Mem. part 3.

(1) No inconvenience arises from the extension of their numbers, as those only attend who are specially summoned for that particular occasion upon which their advice and assistance are required. The cabinet council, as it is called, consists of those ministers of state who are more immediately honored with his majesty's confidence, and who are summoned to consult upon the important and arduous discharge of the executive authority: their number and selection depend only upon the king's pleasure; and each member of that council receives a summons or message for every attendance.

(2) It appears from the 4 Inst. 55. that this office existed in the time of Ja. I; for lord Coke says, "there is, and of ancient time hath been, a president of the council. This office was never granted but by letters patent under the great seal *durante beneplacito*, and is very ancient; for John bishop of Norwich was president of the council in *anno 7 regis Johannis. Dormivit tamen hoc officium regnante magnâ Elizabethâ.*"

But, in order to prevent any persons under foreign attachments from insinuating themselves into this important trust, as happened in the reign of king William in many instances, it is enacted by the act of settlement[l], that no person born out of the dominions of the crown of England, unless born of English parents, even though naturalized by parliament, shall be capable of being of the privy council.

THE *duty* of a privy counsellor appears from the oath of office[m], which consists of seven articles: 1. To advise the king according to the best of his cunning and discretion. 2. To advise for the king's honor and good of the public, without partiality through affection, love, meed, doubt, or dread. 3. To keep the king's counsel secret. 4. To avoid corruption. 5. To help and strengthen the execution [231] of what shall be there resolved. 6. To withstand all persons who would attempt the contrary. And lastly, in general, 7. To observe, keep, and do all that a good and true counsellor ought to do to his sovereign lord.

THE *power* of the privy council is to inquire into all offences against the government, and to commit the offenders to safe custody, in order to take their trial in some of the courts of law. But their jurisdiction herein is only to inquire, and not to punish: and the persons committed by them are entitled to their *habeas corpus* by statute 16 Car. I. c. 10. as much as if committed by an ordinary justice of the peace. And, by the same statute, the court of starchamber, and the court of requests, both of which consisted of privy counsellors, were dissolved; and it was declared illegal for them to take cognisance of any matter of property, belonging to the subjects of this kingdom. But, in plantation or admiralty causes, which arise out of the jurisdiction of this kingdom; and in matters of lunacy or idiocy[n], being a special flower of the prerogative; with regard to these, although they may eventually involve questions of extensive property, the privy

[l] Stat. 12 and 13 Will. III. c. 2. [m] 4 Inst. 54. [n] 3 P. Wms. 108.

council continues to have cognisance, being the court of appeal in such cases: or, rather, the appeal lies to the king's majesty himself in council (3). Whenever also a question arises between two provinces in America or elsewhere, as concerning the extent of their charters and the like, the king in his council exercises *original* jurisdiction therein, upon the principles of feodal sovereignty. And so likewise when any person claims an island or a province, in the nature of a feodal principality, by grant from the king or his ancestors, the determination of that right belongs to his majesty in council: as was the case of the earl of Derby with regard to the isle of Man in the reign of queen Elizabeth, and the earl of Cardigan and others, as representatives of the Duke of Montague, with relation to the island of St. Vincent in 1764. But from all the dominions of the crown, excepting Great Britain and Ireland, an *appellate* jurisdiction (in the last resort) is vested in the same tribunal; which usually exercises its judi- [232] cial authority in a committee of the whole privy council, who hear the allegations and proofs, and make their report to his majesty in council, by whom the judgment is finally given (4).

THE *privileges* of privy counsellors, as such, (abstracted from their honorary precedence[o],) consist principally in the security which the law has given them against attempts and conspiracies to destroy their lives. For, by statute 3 Hen. VII. c. 14. if any of the king's servants, of his household, conspire or imagine to take away the life of a privy counsellor, it is felony,

o See page 405.

(3) This is, in fact, a court of justice, which must consist of at least three privy counsellors.

(4) The court of privy council cannot decree *in personam* in England, unless in certain criminal matters; and the court of chancery cannot decree *in rem* out of the kingdom. See Lord Hardwicke's Arg. in Pen v. Baltimore, 1 Ves. 444. where the jurisdiction of the council and chancery, upon questions arising upon subject-matter abroad, is largely discussed.

though nothing be done upon it. The reason of making this statute, sir Edward Coke[p] tells us, was because such a conspiracy was, just before this parliament, made by some of king Henry the seventh's household servants, and great mischief was like to have ensued thereupon. This extends only to the king's menial servants. But the statute 9 Ann. c. 16. goes farther, and enacts, that *any person* that shall unlawfully attempt to kill, or shall unlawfully assault, and strike, or wound, any privy counsellor in the execution of his office, shall be a felon without benefit of clergy. This statute was made upon the daring attempt of the sieur Guiscard, who stabbed Mr. Harley, afterwards earl of Oxford, with a penknife, when under examination for high crimes in a committee of the privy council.

The *dissolution* of the privy council depends upon the king's pleasure; and he may, whenever he thinks proper, discharge any particular member, or the whole of it, and appoint another. By the common law also it was dissolved *ipso facto* by the king's demise; as deriving all its authority from him. But now, to prevent the inconveniences of having no council in being at the accession of a new prince, it is enacted by statute 6 Ann. c. 7. that the privy council shall continue for six months after the demise of the crown, unless sooner determined by the successor.

[p] 3 Inst. 38.

CHAPTER THE SIXTH.

OF THE KING'S DUTIES.

I PROCEED next to the duties, incumbent on the king by our constitution; in consideration of which duties his dignity and prerogative are established by the laws of the land: it being a maxim in the law, that protection and subjection are reciprocal[a]. And these reciprocal duties are what, I apprehend, were meant by the convention in 1688, when they declared that king James had broken the *original contract* between king and people. But however, as the terms of that original contract were in some measure disputed, being alleged to exist principally in theory, and to be only deducible by reason and the rules of natural law; in which deduction different understandings might very considerably differ; it was, after the revolution, judged proper to declare these duties expressly, and to reduce that contract to a plain certainty. So that, whatever doubts might be formerly raised by weak and scrupulous minds about the existence of such an original contract, they must now entirely cease; especially with regard to every prince, who hath reigned since the year 1688.

THE principal duty of the king is to govern his people according to law. *Nec regibus infinita aut libera potestas*, was the constitution of our German ancestors on the continent[b]. And this is not only consonant to the principles of nature, of liberty, of reason, and of society, but has [234] always been esteemed an express part of the common law of England, even when prerogative was at the highest. "The king," saith Bracton[c], who wrote under Henry III, "ought not to be subject to man, but to God, and to the law;

a 7 Rep. 5. b Tac. de mor. Germ. c. 7. c l. 1. c. 8.

" for the law maketh the king. Let the king therefore ren-
" der to the law, what the law has invested in him with regard
" to others; dominion and power: for he is not truly king,
" where will and pleasure rules, and not the law." And again[d], " the king also hath a superior, namely God, and
" also the law, by which he was made a king (1)." Thus Bracton: and Fortescue also[e], having first well distinguished between a monarchy absolutely and despotically regal, which is introduced by conquest and violence, and a political or civil monarchy, which arises from mutual consent, (of which last species he asserts the government of England to be,) immediately lays it down as a principle, that " the king of
" England must rule his people according to the decrees of
" the laws thereof: insomuch that he is bound by an oath
" at his coronation to the observance and keeping of his own
" laws." But, to obviate all doubts and difficulties concerning this matter, it is expressly declared by statute 12 & 13 W. III. c. 2. that " the laws of England are the birthright
" of the people thereof; and all the kings and queens who
" shall ascend the throne of this realm ought to administer
" the government of the same according to the said laws;
" and all their officers and ministers ought to serve them
" respectively according to the same: and therefore all the
" laws and statutes of this realm, for securing the established
" religion, and the rights and liberties of the people thereof,
" and all other laws and statutes of the same now in force,
" are ratified and confirmed accordingly."

d l. 2. c. 16. sect. 3. e c. 9. and 34.

(1) This is also well and strongly expressed in the year-books: *La ley est le plus haute inheritance que le roy ad; car par la ley il meme et touts ses sujets sont rulés, et si le ley ne fuit, nul roi, et nul inheritance sera.* 19 Hen. VI. 63.

In English: The law is the highest inheritance which the king has; for by the law he himself and all his subjects are governed, and if there were no law, there would be neither king nor inheritance.

And, as to the terms of the original contract between king and people, these I apprehend to be now couched in the coronation oath, which by the statute 1 W. & M. [235] st. 1. c. 6. is to be administered to every king and queen, who shall succeed to the imperial crown of these realms, by one of the archbishops or bishops of the realm, in the presence of all the people; who on their parts do reciprocally take the oath of allegiance to the crown. This coronation oath is conceived in the following terms:

"*The archbishop or bishop shall say*, Will you solemnly "promise and swear to govern the people of this kingdom "of England, and the dominions thereto belonging, accord- "ing to the statutes in parliament agreed on, and the laws "and customs of the same? *The king or queen shall say*, I "solemnly promise so to do. *Archbishop or bishop*. Will you "to your power cause law and justice, in mercy, to be exe- "cuted in all your judgments? *King or queen*. I will. *Arch- "bishop or bishop*. Will you to the utmost of your power "maintain the laws of God, the true profession of the gos- "pel, and the protestant reformed religion established by the "law? And will you preserve unto the bishops and clergy "of this realm, and to the churches committed to their "charge, all such rights and privileges as by law do or shall "appertain unto them, or any of them? *King or queen*. All "this I promise to do. *After this the king or queen, laying "his or her hand upon the holy gospels, shall say*, The things "which I have here before promised I will perform and "keep: so help me God: *and then shall kiss the book* (2)."

(2) And it is required both by the bill of rights, 1 W. & M. st. 2. c. 2. and the act of settlement 12 & 13 W. III. c. 2. that every king and queen of the age of twelve years, either at their coronation, or on the first day of the first parliament upon the throne in the house of peers, (which shall first happen,) shall repeat and subscribe the declaration against popery according to the 30 Car. II. st. 2. c. 1.

THIS is the form of the coronation-oath, as it is now prescribed by our laws; the principal articles of which appear to be at least as ancient as the mirror of justices[f], and even as the time of Bracton[g]: but the wording of it was changed at the revolution, because (as the statute alleges) the [236] oath itself had been framed in doubtful words and expressions, with relation to ancient laws and constitutions at this time unknown[h]. However, in what form soever it be conceived, this is most indisputably a fundamental and original express contract; though doubtless the duty of protection is impliedly as much incumbent on the sovereign before coronation as after: in the same manner as allegiance to the king becomes the duty of the subject immediately on the descent of the crown, before he has taken the oath of allegiance, or whether he ever takes it at all. This reciprocal duty of the subject will be considered in its proper place. At present we are only to observe, that in the king's part of this original contract are expressed all the duties that a monarch can owe to his people: *viz.* to govern according to law; to execute judgment in mercy; and to maintain the established religion. And, with respect to the latter of these three branches, we may farther remark, that by the act of union, 5 Ann. c. 8. two preceding statutes are recited and confirmed; the one of the parliament of

f cap. 1. sec. 2.

g l. 3. tr. 1. c. 9.

h In the old folio abridgment of the statutes, printed by Lettou and Machlinia in the reign of Edward IV, (penes me) there is preserved a copy of the old coronation-oath; which, as the book is extremely scarce, I will here transcribe. Ceo est le serement que le roy jurre a soun coronement: que il gardera et meintenera lez droitez et lez franchisez de seynt eglise grauntez auncienement dez droitez roys christiens dEngletere, et quil gardera toutez sez terrez honoures et dignites droiturelx et franks del coron du roialme dEngletere en tout maner dentier te sanz null maner damenusement, et lez droitez dispergez dilapidez ou perduz de la corone a soun poair reappeller en launcien estate, et quil gardera le peas de seynt eglise et al clergie et al people de bon accorde, et quil face faire en toutez sez jugementez ovel et droit justice oue discretion et misericorde, et quil grauntera a tenure lez leyes et custumez du roialme, et a soun poair lez face garder et affirmer, que lez gentez du people avont faitez et estiez, et les malveys leyz et custumes de tout oustera, et ferme peas et estable al people de soun roialme en eco garde esgardera a soun poair; come Dieu luy aide. (Tit. sacramentum regis. fol. m. ij.) Prynne has also given us a copy of the coronation-oaths of Richard II, (Signal Loyalty. II. 246.) Edward VI, (ibid. 251.) James I, and Charles I, (ibid. 259.)

Scotland, the other of the parliament of England: which enact; the former, that every king at his accession shall take and subscribe an oath, to preserve the protestant religion and presbyterian church government in Scotland; the latter, that at his coronation he shall take and subscribe a similar oath, to preserve the settlement of the church of England within England, Ireland, Wales, and Berwick, and the territories thereunto belonging.

CHAPTER THE SEVENTH.

OF THE KING'S PREROGATIVE.

IT was observed in a former chapter[a], that one of the principal bulwarks of civil liberty, or (in other words) of the British constitution, was the limitation of the king's prerogative by bounds so certain and notorious, that it is impossible he should ever exceed them, without the consent of the people, on the one hand; or without, on the other, a violation of that original contract, which in all states impliedly, and in ours most expressly, subsists between the prince and the subject. It will now be our business to consider this prerogative minutely; to demonstrate its necessity in general; and to mark out in the most important instances its particular extent and restrictions: from which considerations this conclusion will evidently follow, that the powers, which are vested in the crown by the laws of England, are necessary for the support of society; and do not intrench any farther on our *natural* liberties, than is expedient for the maintenance of our *civil*.

THERE cannot be a stronger proof of that genuine freedom, which is the boast of this age and country, than the power of discussing and examining, with decency and respect, the limits of the king's prerogative. A topic, that in some former ages was thought too delicate and sacred to be profaned by the pen of a subject. It was ranked among the *arcana imperii:* and, like the mysteries of the *bona dea*, was

a Chap. 1. page 141.

not suffered to be pried into by any but such as were initiated in its service: because perhaps the exertion of the one, like the solemnities of the other, would not bear the inspection of a rational and sober inquiry. The glorious queen Elizabeth herself made no scruple to direct her parliaments to abstain from discoursing of matters of state[b]; and it was the constant language of this favorite princess and her ministers, that even that august assembly "ought not to deal, "to judge, or to meddle with her majesty's prerogative "royal[c]." And her successor, king James the first, who had imbibed high notions of the divinity of regal sway, more than once laid it down in his speeches, that "as it is atheism "and blasphemy in a creature to dispute what the deity may "do, so it is presumption and sedition in a subject to dispute "what a king may do in the height of his power: good "christians, he adds, will be content with God's will, "revealed in his word; and good subjects will rest in the "king's will, revealed in *his* law[d]."

But, whatever might be the sentiments of some of our princes, this was never the language of our ancient constitution and laws. The limitation of the regal authority was a first and essential principle in all the Gothic systems of government established in Europe, though gradually driven out and overborne, by violence and chicane, in most of the kingdoms on the continent. We have seen, in the preceding chapter, the sentiments of Bracton and Fortescue, at the distance of two centuries from each other. And sir Henry Finch, under Charles the first, after the lapse of two centuries more, though he lays down the law of prerogative in very strong and emphatical terms, yet qualifies it with a general restriction, in regard to the liberties of the people. "The king hath a prerogative in all things that are not injurious to the subject; for in them all it must be remembered, that the king's prerogative stretcheth not to the "doing of any wrong[e]." *Nihil enim aliud potest rex, nisi id*

b D'ewes. 479.
c Ibid. 645.
d King James's works. 557. 531.
e Finch. L. 84. 85.

solum quod de jure potest[f]. And here it may be some satisfaction to remark, how widely the civil law differs from our own, with regard to the authority of the laws over the prince, or (as a civilian would rather have expressed it) the authority of the prince over the laws. It is a maxim of the English law, as we have seen from Bracton, that "*rex debet esse* "*sub lege, quia lex facit regem:*" the imperial law will tell us, that, "*in omnibus, imperatoris excipitur fortuna; cui* "*ipsas leges Deus subjecit*[g]." We shall not long hesitate to which of them to give the preference, as most conducive to those ends for which societies were framed, and are kept together; especially as the Roman lawyers themselves seem to be sensible of the unreasonableness of their own constitution. "*Decet tamen principem,*" says Paulus, "*servare leges,* "*quibus ipse solutus est*[h]." This is at once laying down the principle of despotic power, and at the same time acknowledging its absurdity.

By the word prerogative we usually understand that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies, in its etymology, (from *prae* and *rogo*) something that is required or demanded before, or in preference to, all others. And hence it follows, that it must be in its nature singular and eccentrical; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects: for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer. And therefore Finch[i] lays it down as a maxim, that the prerogative is that law in case of the king, which is law in no case of the subject.

Prerogatives are either *direct* or *incidental*. The *direct* are such positive substantial parts of the royal character and

f Bracton. l. 3. tr. 1. c. 9.
g Nov. 105. sec. 2.
h Ff. 32. 1. 23.
i Finch. L. 85.

authority, as are rooted in and spring from the king's political person, considered merely by itself, without reference to any other extrinsic circumstance; as, the right of sending embassadors, of creating peers, and of making war or peace. But such prerogatives as are *incidental* bear always a relation to something else, distinct from the king's person; and are indeed only exceptions, in favor of the crown, to those general rules that are established for the rest of the community; such as, that no costs shall be recovered against the king; that the king can never be a joint-tenant; and that his debt shall be preferred before a debt to any of his subjects. These, and an infinite number of other instances, will better be understood, when we come regularly to consider the rules themselves, to which these incidental prerogatives are exceptions. And therefore we will at present only dwell upon the king's substantive or direct prerogatives.

THESE substantive or direct prerogatives may again be divided into three kinds: being such as regard, first, the king's royal *character*; secondly, his royal *authority*; and, lastly, his royal *income*. These are necessary, to secure reverence to his person, obedience to his commands, and an affluent supply for the ordinary expenses of government; without all of which it is impossible to maintain the executive power in due independence and vigor. Yet, in every branch of this large and extensive dominion, our free constitution has interposed such seasonable checks and restrictions, as may curb it from trampling on those liberties, which it was meant to secure and establish. The enormous weight of prerogative, if left to itself, (as in arbitrary governments it is,) spreads havoc and destruction among all the inferior movements; but, when balanced and regulated (as with us) by its proper counterpoise, timely and judiciously applied, its operations are then equable and certain, it invigorates the whole machine, and enables every part to answer the end of its construction.

IN the present chapter we shall only consider the two first of these divisions, which relate to the king's political *cha-*

racter and *authority:* or, in other words, his *dignity* and regal *power;* to which last the name of prerogative is frequently narrowed and confined. The other division, which forms the royal *revenue*, will require a distinct examination; according to the known distribution of the feodal writers, who distinguish the royal prerogatives into the *majora* and *minora regalia*, in the latter of which classes the rights of the revenue are ranked. For to use their own words, "*majora regalia* "*imperii prae-eminentiam spectant; minora vero ad commo-* "*dum pecuniarium immediate attinent; et haec proprie fisca-* "*lia sunt, et ad jus fisci pertinent* [k]."

FIRST, then, of the royal dignity. Under every monarchical establishment, it is necessary to distinguish the prince from his subjects, not only by the outward pomp and decorations of majesty, but also by ascribing to him certain qualities, as inherent in his royal capacity, distinct from and superior to those of any other individual in the nation. For, though a philosophical mind will consider the royal person merely as one man appointed by mutual consent to preside over many others, and will pay him that reverence and duty which the principles of society demand, yet the mass of mankind will be apt to grow insolent and refractory, if taught to consider their prince as a man of no greater perfection than themselves. The law therefore ascribes to the king, in his high political character, not only large powers and emoluments, which form his prerogative and revenue, but likewise certain attributes of a great and transcendent nature; by which the people are led to consider him in the light of a superior being, and to pay him that awful respect, which may enable him with greater ease to carry on the business of government. This is what I understand by the royal dignity, the several branches of which we shall now proceed to examine.

I. AND, first, the law ascribes to the king the attribute of *sovereignty*, or pre-eminence. "*Rex est vicarius*," says Bracton [l], "*et minister Dei in terra: omnis quidem sub eo est, et ipse*

k Peregrin, de jure fisc, l. 1. c. 1. num. 9.

l l. 1. c. 8.

"*sub nullo, nisi tantum sub Deo* (1)." He is said to have *imperial* dignity; and in charters before the conquest is frequently styled *basileus* and *imperator*, the titles respectively assumed by the emperors of the east and west[m]. His realm is declared to be an *empire*, and his crown *imperial*, by many acts of parliament, particularly the statutes 24 Hen. VIII. c. 12. and 25 Hen. VIII. c. 28[n]; which at the same time declare the king to be the supreme head of the realm in matters both civil and ecclesiastical, and of consequence inferior to no man upon earth, dependent on no man, accountable to no man. Formerly there prevailed a ridiculous notion, propagated by the German and Italian civilians, that an emperor could do many things which a king could not, (as the creation of notaries and the like,) and that all kings were in some degree subordinate and subject to the emperor of Germany or Rome. The meaning therefore of the legislature, when it uses these terms of *empire* and *imperial*, and applies them to the realm and crown of England, is only to assert that our king is equally sovereign and independent within these his dominions, as any emperor is in his empire[o]; and owes no kind of subjection to any other potentate upon earth. Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it: but who, says Finch[p], shall command the king? Hence it is likewise, that by law the person of the king is sacred, even though the mea-

m Seld. tit. of hon. l. 2.

n See also 34 Geo. II. c. 24. 5 Geo. III. c. 27.

o Rex allegavit, quod ipse omnes libertates haberet in regno suo, quas imperator vendicabat in imperio. (M. Paris, A. D. 1095.)

p Finch. L. 83.

(1) What Bracton adds in the same chapter ought never to be forgotten: *Ipse autem rex non debet esse sub homine, sed sub Deo et sub lege, quia lex facit regem. Attribuat igitur rex legi, quod lex attribuit ei, videlicet dominationem et potestatem, non est enim rex, ubi dominatur voluntas et non lex.*

sures pursued in his reign be completely tyrannical and arbitrary: for no jurisdiction upon earth has power to try him in a criminal way; much less to condemn him to punishment. If any foreign jurisdiction had this power, as was formerly claimed by the pope, the independence of the kingdom would be no more: and, if such a power were vested [243] in any domestic tribunal, there would soon be an end of the constitution, by destroying the free agency of one of the constituent parts of the sovereign legislative power.

ARE then, it may be asked, the subjects of England totally destitute of remedy, in case the crown should invade their rights, either by private injuries, or public oppressions? To this we may answer, that the law has provided a remedy in both cases.

AND, first, as to private injuries: if any person has, in point of property, a just demand upon the king, he must petition him in his court of chancery, where his chancellor will administer right as a matter of grace, though not upon compulsion[q]. And this is entirely consonant to what is laid down by the writers on natural law. "A subject," says Puffendorf[r], "so long as he continues a subject, hath no way "to *oblige* his prince to give him his due, when he refuses it; "though no wise prince will ever refuse to stand to a lawful "contract. And, if the prince gives the subject leave to "enter an action against him, upon such contract, in his own "courts, the action itself proceeds rather upon natural equity,

q Finch. L. 255. See b. III. c. 17. r Law of N. and N. b. 8. c. 10.

Nothing was ever better conceived and expressed respecting the prerogatives of a king, and the just exercise of them, than the advice bequeathed in his last will by the unfortunate Louis XVI. to his son, if he had succeeded to the throne of France; viz. "to recollect, that he "cannot promote the welfare of the people, but by reigning according "to the laws; but to consider, at the same time, that a king cannot "make the laws respected, nor do the good he meditates, but in proportion as he has the necessary authority; and that where this is wanting, he is obstructed in his measures, he is incapable of inspiring "respect, and is, consequently, more detrimental than useful."

"than upon the municipal laws." For the end of such action is not to *compel* the prince to observe the contract, but to *persuade* him. And, as to personal wrongs; it is well observed by Mr. Locke[s], "the harm which the sovereign can do in "his own person not being likely to happen often, nor to "extend itself far; nor being able by his single strength to "subvert the laws, nor oppress the body of the people, "(should any prince have so much weakness and ill-nature "as to endeavour to do it,) the inconveniency therefore of "some particular mischiefs, that may happen sometimes, "when a heady prince comes to the throne, are well recom-"pensed by the peace of the public and security of the "government, in the person of the chief magistrate being "thus set out of the reach of danger."

NEXT, as to cases of ordinary public oppression, [244] where the vitals of the constitution are not attacked, the law hath also assigned a remedy. For as a king cannot misuse his power, without the advice of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished. The constitution has therefore provided, by means of indictments, and parliamentary impeachments, that no man shall dare to assist the crown in contradiction to the laws of the land. But it is at the same time a maxim in those laws, that the king himself can do no wrong: since it would be a great weakness and absurdity in any system of positive law, to define any possible wrong, without any possible redress.

FOR, as to such public oppressions as tend to dissolve the constitution, and subvert the fundamentals of government, they are cases, which the law will not, out of decency, suppose: being incapable of distrusting those, whom it has invested with any part of the supreme power; since such distrust would render the exercise of that power precarious and impracticable[t]. For, wherever the law expresses its distrust of abuse of power, it always vests a superior coercive autho-

[s] On Gov. p. 2. sec. 205.

[t] See these points more fully discussed in the *considerations of the law of forfeiture*, 3d edit. pag. 109—126. wherein the very learned author has thrown many new and important lights on the texture of our happy constitution.

rity in some other hand to correct it; the very notion of which destroys the idea of sovereignty. If therefore (for example) the two houses of parliament, or either of them, had avowedly a right to animadvert on the king, or each other, or if the king had a right to animadvert on either of the houses, that branch of the legislature, so subject to animadversion, would instantly cease to be part of the supreme power; the balance of the constitution would be overturned; and that branch or branches, in which this jurisdiction resided, would be completely sovereign. The supposition of *law* therefore is, that neither the king nor either house of parliament (collectively taken) is capable of doing any wrong; since in such cases the law feels itself incapable of furnishing any [245] adequate remedy. For which reason all oppressions, which may happen to spring from any branch of the sovereign power, must necessarily be out of the reach of any *stated rule*, or *express legal* provision: but, if ever they unfortunately happen, the prudence of the times must provide new remedies upon new emergencies.

INDEED, it is found, by experience, that whenever the unconstitutional oppressions, even of the sovereign power, advance with gigantic strides and threaten desolation to a state, mankind will not be reasoned out of the feelings of humanity; nor will sacrifice their liberty by a scrupulous adherence to those political maxims, which were originally established to preserve it. And therefore, though the positive laws are silent, experience will furnish us with a very remarkable case, wherein nature and reason prevailed. When king James the second invaded the fundamental constitution of the realm, the convention declared an abdication, whereby the throne was rendered vacant, which induced a new settlement of the crown. And so far as this precedent leads, and no farther, we may now be allowed to lay down the *law* of redress against public oppression. If therefore any future prince should endeavour to subvert the constitution by breaking the original contract between king and people, should violate the fundamental laws, and should withdraw himself

out of the kingdom; we are now authorized to declare that this conjunction of circumstances would amount to an abdication, and the throne would be thereby vacant. But it is not for us to say that any one, or two, of these ingredients would amount to such a situation; for there our precedent would fail us. In these therefore, or other circumstances, which a fertile imagination may furnish, since both law and history are silent, it becomes us to be silent too; leaving to future generations, whenever necessity and the safety of the whole shall require it, the exertion of those inherent (though latent) powers of society, which no climate, no time, no constitution, no contract, can ever destroy or diminish.

II. Besides the attribute of sovereignty, the law [246] also ascribes to the king, in his political capacity, absolute *perfection*. The king can do no wrong. Which ancient and fundamental maxim is not to be understood, as if every thing transacted by the government was of course just and lawful, but means only two things. First, that whatever is exceptionable in the conduct of public affairs is not to be imputed to the king, nor is he answerable for it personally to his people: for this doctrine would totally destroy that constitutional independence of the crown, which is necessary for the balance of power in our free and active, and therefore compounded, constitution. And, secondly, it means that the prerogative of the crown extends not to do any injury; it is created for the benefit of the people, and therefore cannot be exerted to their prejudice[u] (2).

[u] Plowd. 487.

(2) Or perhaps it means that, although the king is subject to the passions and infirmities of other men, the constitution has prescribed no mode by which he can be made personally amenable for any wrong that he may actually commit. The law will therefore presume no wrong, where it has provided no remedy.

The inviolability of the king is essentially necessary to the free exercise of those high prerogatives, which are vested in him, not for his own private splendor and gratification, as the vulgar and ignorant are too apt to imagine, but for the security and preservation of the real happiness and liberty of his subjects.

THE king, moreover, is not only incapable of *doing* wrong, but even of thinking *wrong*; he can never mean to do an improper thing: in him is no folly or weakness. And therefore if the crown should be induced to grant any franchise or privilege to a subject contrary to reason, or in any wise prejudicial to the commonwealth, or a private person, the law will not suppose the king to have meant either an unwise or an injurious action, but declares that the king was deceived in his grant; and thereupon such grant is rendered void, merely upon the foundation of fraud and deception either by or upon those agents whom the crown has thought proper to employ. For the law will not cast an imputation on that magistrate whom it intrusts with the executive power, as if he was capable of intentionally disregarding his trust: but attributes to mere imposition (to which the most perfect of sublunary beings must still continue liable) those little inadvertencies, which, if charged on the will of the prince, might lessen him in the eyes of his subjects.

[247] YET still, notwithstanding this personal perfection, which the law attributes to the sovereign, the constitution has allowed a latitude of supposing the contrary, in respect to both houses of parliament; each of which, in its turn, hath exerted the right of remonstrating and complaining to the king even of those acts of royalty, which are most properly and personally his own; such as messages signed by himself and speeches delivered from the throne. And yet, such is the reverence which is paid to the royal person, that though the two houses have an undoubted right to consider these acts of state in any light whatever, and accordingly treat them in their addresses as personally proceeding from the prince, yet among themselves (to preserve the more perfect decency, and for the greater freedom of debate) they usually suppose them to flow from the advice of the administration. But the privilege of canvassing thus freely the personal acts of the sovereign (either directly, or even through the medium of his reputed advisers) belongs to no individual, but is confined to those august assemblies; and there too the

objections must be proposed with the utmost respect and deference. One member was sent to the tower [w], for suggesting that his majesty's answer to the address of the commons contained "high words to fright the members out of their duty;" and another [x], for saying that a part of the king's speech "seemed rather "to be calculated for the meridian of Germany than Great Brit-"ain, and that the king was a stranger to our language and "constitution."

In farther pursuance of this principle, the law also determines that in the king can be no negligence, or *laches*, and therefore no delay will bar his right. *Nullum tempus occurrit regi* has been the standing maxim upon all occasions (3): for the law intends that the king is always busied for the public good, and therefore has not leisure to assert his right within the times limited to subjects [y]. In the king also can be no stain or corruption of blood: for if the heir to the crown [248] were attainted of treason or felony, and afterwards the crown should descend to him, this would purge the attainder *ipso facto* [z]. And therefore when Henry VII, who as earl of Richmond stood attainted, came to the crown, it was not thought necessary to pass an act of parliament to reverse this attainder; because, as lord Bacon in his history of that prince

w Com. Journ. 18 Nov. 1685.
x Ibid. 4 Dec. 1717.
y Finch. L. 82. Co. Litt. 90.
z Finch. L. 82.

(3) In civil actions relating to landed property, by the 9 Geo. III. c. 16. the king like a subject is limited to sixty years. See 3 Vol. 307. This maxim applies also to criminal prosecutions, which are brought in the name of the king, and therefore by the common law there is no limitation in treasons, felonies, or misdemesnors. By the 7 W. III. c. 7. an indictment for treason, except for an attempt to assassinate the king, must be found within three years after the commission of the treasonable act. 4 Vol. 351. But where the legislature has fixed no limit, *nullum tempus occurrit regi* holds true: thus a man may be convicted of murder at any distance of time within his life after the commission of the crime. This maxim obtains still in full force in Ireland. 1 *Ld. Mountm.* 365.

informs us, it was agreed that the assumption of the crown had at once purged all attainders. Neither can the king in judgment of law, as king, ever be a minor or under age; and therefore his royal grants and assents to acts of parliament are good, though he has not in his natural capacity attained the legal age of twenty-one[a]. By a statute, indeed, 28 Hen. VIII. c. 17. power was given to future kings to rescind and revoke all acts of parliament that should be made while they were under the age of twenty-four: but this was repealed by the statute 1 Edw. VI. c. 11. so far as related to that prince; and both statutes are declared to be determined by 24 Geo. II. c. 24. It hath also been usually thought prudent when the heir apparent has been very young, to appoint a protector, guardian, or regent, for a limited time: but the very necessity of such extraordinary provision is sufficient to demonstrate the truth of that maxim of the common law, that in the king is no minority; and therefore he hath no legal guardian[b].

a Co. Litt. 43. 2 Inst. proem. 3.

b The methods of appointing this guardian or regent have been so various, and the duration of his power so uncertain, that from hence alone it may be collected that his office is unknown to the common law; and therefore (as sir Edward Coke says, 4 Inst. 58.) the surest way is to have him made by authority of the great council in parliament. The earl of Pembroke, by his own authority assumed in very troublesome times the regency of Hen. III, who was then only nine years old; but was declared of full age by the pope at seventeen, confirmed the great charter at eighteen, and took upon him the administration of the government at twenty. A guardian and council of regency were named for Edward III, by the parliament, which deposed his father; the young king being then fifteen, and not assuming the government till three years after. When Richard II. succeeded at the age of eleven; the duke of Lancaster took upon him the management of the kingdom, till the parliament met, which appointed a nominal council to assist him. Henry V. on his death-bed named a regent and a guardian for his infant son Henry VI, then nine months old; but the parliament altered his disposition, and appointed a protector and council, with a special limited authority. Both these princes remained in a state of pupilage till the age of twenty-three. Edward V, at the age of thirteen, was recommended by his father to the care of the duke of Gloucester; who was declared protector by the privy council. The statutes 25 Hen. VIII. c. 12. and 28 Hen. VIII. c. 7. provided, that the successor, if a male and under eighteen, or if a female and under sixteen, should be till such age in the government of his or her natural mother, (if approved by the king,) and such other counsellors as his majesty should by will or otherwise appoint: and he accordingly appointed his sixteen executors to have the government of his son Edward VI, and the kingdom, which executors elected the earl of Hertford protector. The statute 24 Geo. II. c. 24. in case the crown should descend to any of the children of Frederic late prince of Wales under the age of eighteen appointed

III. A THIRD attribute of the king's majesty is his *perpetuity*. The law ascribes to him, in his political capacity, an absolute immortality. The king never dies. Henry, Edward, or George may die; but the king survives them all. For immediately upon the decease of the reigning prince in his natural capacity, his kingship or imperial dignity, by act of law, without any *interregnum* or interval, is vested at once in his heir; who is, *eo instanti*, king to all intents and purposes. And so tender is the law of supposing even a possibility of his death, that his natural dissolution is generally called his *demise; demisso regis, vel coronae:* an expression which signifies merely a transfer of property; for, as is observed in Plowden[c], when we say the demise of the crown, we mean only that, in consequence of the disunion of the king's natural body from his body politic, the kingdom is transferred or demised to his successor; and so the royal dignity remains perpetual. Thus too, when Edward the fourth, in the tenth year of his reign, was driven from his throne for a few months by the house of Lancaster, this temporary transfer of his dignity was denominated his *demise;* and all process was held to be discontinued, as upon a natural death of the king[d].

WE are next to consider those branches of the royal [250] prerogative, which invest thus our sovereign lord, thus all-perfect and immortal in his kingly capacity, with a number of authorities and powers; in the exertion whereof consists the executive part of government. This is wisely placed in a single hand by the British constitution, for the sake of unanimity, strength, and despatch. Were it placed in many hands, it would be subject to many wills: many wills, if disunited and drawing different ways, create weakness in a government; and to unite those several wills, and reduce them to one, is a work

the princess dowager; and that of 5 Geo. III. c. 27. in case of a like descent to any of his present majesty's children, empowers the king to name either the queen, the princess dowager, or any descendant of king George II. residing in this kingdom; to be guardian and regent, till the successor attains such age, assisted by a council of regency: the powers of them all being expressly defined and set down in the several acts.

c Plowd. 177, 234.

d M. 49 Hen. VI. pl. 1—6.

of more time and delay than the exigencies of state will afford. The king of England is therefore not only the chief, but properly the sole, magistrate of the nation; all others acting by commission from, and in due subordination to him: in like manner as, upon the great revolution in the Roman state, all the powers of the ancient magistracy of the commonwealth were concentred in the new emperor: so that, as Gravina[e] expresses it, "*in ejus unius persona vetcris reipublicae vis atque majestas per cumulatas magistratuum potestates exprimebatur.*"

After what has been premised in this chapter, I shall not (I trust) be considered as an advocate for arbitrary power, when I lay it down as a principle, that, in the exertion of lawful prerogative, the king is and ought to be absolute; that is, so far absolute, that there is no legal authority that can either delay or resist him. He may reject what bills, may make what treaties, may coin what money, may create what peers, may pardon what offences he pleases: unless where the constitution hath expressly, or by evident consequence, laid down some exception or boundary; declaring, that thus far the prerogative shall go and no farther. For otherwise the power of the crown would indeed be but a name and a shadow, insufficient for the ends of government, if, where its jurisdiction is clearly established and allowed, any man or body of men were permitted to disobey it, in the ordinary course of law: I say, in the *ordinary* course of law; for I do not now speak of those *extra-*
[251] *ordinary* recourses to first principles, which are necessary when the contracts of society are in danger of dissolution, and the law proves too weak a defence against the violence of fraud or oppression. And yet the want of attending to this obvious distinction has occasioned these doctrines, of absolute power in the prince and of national resistance by the people, to be much misunderstood and perverted, by the advocates for slavery on the one hand, and the demagogues of faction on the other. The former, observing the absolute sovereignty and transcendent dominion of the crown laid

e Orig. l. sec. 103.

down (as it certainly is) most strongly and emphatically in our law-books, as well as our homilies, have denied that any case can be excepted from so general and positive a rule; forgetting how impossible it is, in any practical system of laws, to point out beforehand those eccentrical remedies, which the sudden emergence of national distress may dictate, and which that alone can justify. On the other hand, over-zealous republicans, feeling the absurdity of unlimited passive obedience, have fancifully (or sometimes factiously) gone over to the other extreme: and, because resistance is justifiable to the person of the prince when the being of the state is endangered, and the public voice proclaims such resistance necessary, they have therefore allowed to every individual the right of determining this expedience, and of employing private force to resist even private oppression. A doctrine productive of anarchy, and (in consequence) equally fatal to civil liberty as tyranny itself. For civil liberty, rightly understood, consists in protecting the rights of individuals by the united force of society: society cannot be maintained, and of course can exert no protection, without obedience to some sovereign power: and obedience is an empty name, if every individual has a right to decide how far he himself shall obey.

In the exertion therefore of those prerogatives, which the law has given him, the king is irresistible and absolute, according to the forms of the constitution. And yet, if the consequence of that exertion be manifestly to the grievance or dishonor of the kingdom, the parliament will call his advisers to a just and severe account. For pre- [252] rogative consisting (as Mr. Locke[f] has well defined it) in the discretionary power of acting for the public good, where the positive laws are silent; if that discretionary power be abused to the public detriment, such prerogative is exerted in an unconstitutional manner. Thus the king may make a treaty with a foreign state, which shall irrevocably bind the nation; and yet, when such treaties have been judged perni-

[f] on Gov. 2. sec. 166.

cious, impeachments have pursued those ministers, by whose agency or advice they were concluded.

THE prerogatives of the crown (in the sense under which we are now considering them) respect either this nation's intercourse with foreign nations, or its own domestic government and civil polity.

WITH regard to foreign concerns, the king is the delegate or representative of his people. It is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves. Unanimity must be wanting to their measures, and strength to the execution of their counsels. In the king therefore, as in a centre, all the rays of his people are united, and form by that union a consistency, splendor, and power, that make him feared and respected by foreign potentates; who would scruple to enter into any engagement, that must afterwards be revised and ratified by a popular assembly. What is done by the royal authority, with regard to foreign powers, is the act of the whole nation: what is done without the king's concurrence is the act only of private men. And so far is this point carried by our law, that it hath been held[s], that should all the subjects of England make war with a king in league with the king of England, without the royal assent, such war is no breach of the league. And, by the statute 2 Hen. V. c. 6. any subject committing acts of hostility upon any nation in league with the king was declared to be guilty of high treason: and, though that act was repealed by the statute 20 Hen. VI. c. 11. so far as relates to the making this offence high treason, yet still it remains a very great offence against the law of nations, and punishable by our laws, either capitally or otherwise, according to the circumstances of the case.

[253]

I. THE king, therefore, considered as the representative of his people, has the sole power of sending embassadors to

[s] 4 Inst. 152.

foreign states, and receiving embassadors at home. This may lead us into a short digression, by way of inquiry, how far the municipal laws of England intermeddle with or protect the rights of these messengers from one potentate to another, whom we call embassadors.

THE rights, the powers, the duties, and the privileges of embassadors are determined by the law of nature and nations, and not by any municipal constitutions. For, as they represent the persons of their respective masters, who owe no subjection to any laws but those of their own country, their actions are not subject to the control of the private law of that state wherein they are appointed to reside. He that is subject to the coercion of laws is necessarily dependent on that power by whom those laws were made: but an embassador ought to be independent of every power, except that by which he is sent; and of consequence ought not to be subject to the mere municipal laws of that nation wherein he is to exercise his functions. If he grossly offends, or makes an ill use of his character, he may be sent home and accused before his master[h]; who is bound either to do justice upon him, or avow himself the accomplice of his crimes[i]. But there is great dispute among the writers on the laws of nations, whether this exemption of embassadors extends to all crimes, as well natural as positive; or whether it only extends to such as are *mala prohibita*, as coining, and not to those that are *mala in se*, as murder[k]. Our law seems to have formerly taken in the restriction, as well as the general exemption. For it has been held, both by our common lawyers and civilians[l], that an embas- [254] sador is privileged by the law of nature and nations; and yet, if he commits any offence against the law of reason and nature, he shall loose his privilege[m]: and that therefore, if an embassador conspires the death of the king in whose land

h As was done with count Gyllenberg the Swedish minister to Great Britain. A. D. 1716.

i Sp. L. 26. 21.

k Van Leeuwen in Pf. 80. 7. 17. Barbeyrac's Puff. l. 8. c. 9. sec. 9. and 17. Van Bynkershoek de fero legator. c. 17, 18, 19.

l 1 Roll. Rep. 175. 3 Bulstr. 27.

m 4 Inst. 153.

he is, he may be condemned and executed for treason; but if he commits any other species of treason, it is otherwise, and he must be sent to his own kingdom[n]. And these positions seem to be built upon good appearance of reason. For since, as we have formerly shewn, all municipal laws act in subordination to the primary law of nature, and, where they annex a punishment to natural crimes, are only declaratory of and auxiliary to that law; therefore to this natural universal rule of justice embassadors, as well as other men, are subject in all countries; and of consequence it is reasonable that, wherever they transgress it, there they shall be liable to make atonement[o]. But, however these principles might formerly obtain, the general practice of this country, as well as of the rest of Europe, seems now to pursue the sentiments of the learned Grotius, that the security of embassadors is of more importance than the punishment of a particular crime[p]. And therefore few, if any, examples have happened within a century past, where an embassador has been punished for any offence, however atrocious in its nature (4).

n 1 Roll. Rep. 185.
o Foster's reports. 188.
p Securitas legatorum utilitati quae ex poena est praeponderat. (de jure b. and p. 18. 4. 4.)

(4) In the year 1654, during the protectorate of Cromwell, Don Pataleon Sa, the brother of the Portuguese embassador, who had been joined with him in the same commission, was tried, convicted, and executed, for an atrocious murder. Lord Hale, 1 P. C. 99. approves of the proceeding; and Mr. J. Foster (p. 188.), though a modern writer of law, lays it down that, "for murder and other offences of great enormity "which are against the light of nature and the fundamental laws of all "society, embassadors are certainly liable to answer in the ordinary "course of justice, as other persons offending in the like manner are:" but Mr. Hume observes upon this case, that "the laws of nations were "here plainly violated." 7 Vol. 237. And Vattel with irresistible ability contends, that the universal inviolability of an embassador is an object of much greater importance to the world than their punishment for crimes however contrary to natural justice. "A minister," says that profound writer, "is often charged with a commission dis-

In respect to civil suits, all the foreign jurists agree, that neither an embassador, nor any of his train or *comites*, can be prosecuted for any debt or contract in the courts of that kingdom wherein he is sent to reside. Yet sir Edward Coke maintains, that, if an embassador make a contract which is good *jure gentium*, he shall answer for it here[q]. But the truth is, so few cases (if any) had arisen, wherein the privilege was either claimed or disputed, even with regard to civil suits, that our law-books are (in general) quite silent upon it previous to the reign of queen Anne; when [255] an embassador from Peter the great, czar of Muscovy, was actually arrested and taken out of his coach in London[r], for a debt of fifty pounds which he had there contracted. Instead of applying to be discharged upon his privi-

q 4 Inst. 153. r 21 July 1708. Boyer's annals of queen Anne.

"agreeable to the prince to whom he is sent. If this prince has any "power over him, and especially if his authority be sovereign, how is "it to be expected that the minister can execute his master's orders "with a proper freedom of mind, fidelity, and firmness? It is neces- "sary he should have no snares to fear, that he cannot be diverted "from his functions by any chicanery. He must have nothing to hope, "and nothing to fear, from the sovereign to whom he is sent. There- "fore, in order to the success of his ministry, he must be independent "of the sovereign's authority, and of the jurisdiction of the country "both civil and criminal." B. 4. c. 7. s. 92. where this subject is discussed in a most luminous manner. The Romans, in the infancy of their state, acknowledged the expediency of the independence of embassadors; for when they had received embassadors from the Tarquin princes, whom they had dethroned, and had afterwards detected those embassadors in secretly committing acts which might have been considered as treason against the state, they sent them back unpunished; upon which Livy observes, *et quanquam visi sunt commisisse, ut hostium loco essent, jus tamen gentium valuit.* Lib. 2. c. 4. When Bomilcar, *qui Romam fide publicâ venerat*, was prosecuted as an accomplice in the assassination of Massiva, Sallust declares, *fit reus magis ex æquo bonoque quam ex jure gentium.* Bell. Jug. c. 35.

lege, he gave bail to the action, and the next day complained to the queen. The persons who were concerned in the arrest were examined before the privy council, (of which the lord chief justice Holt was at the same time sworn a member[s],) and seventeen were committed to prison[t]: most of whom were prosecuted by information in the court of queen's bench, at the suit of the attorney general[u], and at their trial before the lord chief justice were convicted of the facts by the jury[w], reserving the question of law, how far those facts were criminal, to be afterwards argued before the judges; which question was never determined (5). In the mean time the czar resented this affront very highly, and demanded that the sheriff of Middlesex and all others concerned in the arrest should be punished with instant death[x]. But the queen (to the amazement of that despotic court) directed her secretary to inform him, "that she could inflict no punishment upon any, the "meanest, of her subjects, unless warranted by the law of "the land: and therefore was persuaded that he would not "insist upon impossibilities[y]." To satisfy however the clamors of the foreign ministers (who made it a common cause) as well as to appease the wrath of Peter, a bill was brought

s 25 July 1708. Ibid.
t 25, 29 July 1708. Ibid.
u 23 Oct. 1708. Ibid.
w 14 Feb. 1708. Ibid.
x 17 Sept. 1708. Ibid.
y 11 Jan. 1708. Ibid. Mod. Un. Hist. xxxv. 454.

(5) In 3 Burr. 1480. lord Mansfield declares, that "the statute of "queen Anne was not occasioned by any doubt, whether the law of "nations, particularly the part relative to public ministers, was not "part of the law of England, and the infraction criminal, nor intended "to vary an iota of it." And he proceeds to say, that lord Talbot, lord Hardwicke, and lord Holt, were clearly of the same opinion. But the infraction of the law of nations can only be a misdemesnor punishable at the discretion of the court, by fine, imprisonment, and pillory; and therefore lord Mansfield says, the persons convicted were never brought up to receive judgment; for "no punishment would have been thought "by the czar an adequate reparation. Such a sentence as the court "would have given, he would have thought a fresh insult."

into parliament[z], and afterwards passed into a law[a], to prevent and punish such outrageous insolence for the future. And with a copy of this act, elegantly engrossed and illuminated, accompanied by a letter from the queen, an embassador extraordinary[b] was commissioned to appear at Moscow[c], who declared "that though her majesty could not "inflict such a punishment as was required, because [256] "of the defect in that particular of the former esta- "blished constitutions of her kingdom, yet, with the unani- "mous consent of the parliament, she had caused a new act "to be passed, to serve as a law for the future." This humiliating step was accepted as a full satisfaction by the czar; and the offenders, at his request, were discharged from all farther prosecution.

THIS statute[d] recites the arrest which had been made, "in "contempt of the protection granted by her majesty, con- "trary to the law of nations, and in prejudice of the rights "and privileges, which embassadors and other public minis- "ters have at all times been thereby possessed of, and ought "to be kept sacred and inviolable;" wherefore it enacts that for the future all process whereby the person of any embassador, or of his domestic, or domestic servant may be arrested, or his goods distrained or seised, shall be utterly null and void; and the persons prosecuting, soliciting, or executing such process shall be deemed violators of the law of nations, and disturbers of the public repose; and shall suffer such penalties and corporal punishment as the lord chancellor and the two chief justices, or any two of them, shall think fit (6). But it is expressly provided, that no trader, within the description of the bankrupt laws, who shall be in the service of any embassador, shall be privileged or protected by this

z Com. Journ. 23 Dec. 1708.
a 21 Apr. 1709. Boyer, ibid.
b Mr. Whitworth.
c 8 Jan. 1709. Boyer, ibid.
d 7 Ann. c. 12.

(6) Perhaps it was intended as a compliment to the czar, that the offender is deprived of the trial by jury; and as he is to suffer any corporal punishment that two of these three judges may think fit to inflict,

act; nor shall any one be punished for arresting an embassador's servant, unless his name be registered with the secretary of state, and by him transmitted to the sheriffs of London and Middlesex (7). Exceptions that are strictly conformable to the rights of embassadors[e], as observed in the most civilized countries. And, in consequence of this statute, thus declaring and enforcing the law of nations, these privileges are now [257] held to be part of the law of the land, and are constantly allowed in the courts of common law[f].

II. It is also the king's prerogative to make treaties, leagues, and alliances with foreign states and princes. For it is by the law of nations essential to the goodness of a league, that it be made by the sovereign power[g]; and then it is binding upon the whole community: and in England the sovereign power, *quoad hoc*, is vested in the person of the king. Whatever contracts therefore he engages in, no other power in the kingdom can legally delay, resist, or annul. And yet, lest this plenitude of authority should be abused to the detriment of the public, the constitution (as was hinted before) hath here interposed a check, by the means of parliamentary impeachment, for the punishment of such ministers as from criminal motives advise or conclude any treaty, which shall afterwards be judged to derogate from the honor and interest of the nation.

e Saepe quaesitum est an comitum numero et jure habendi sunt, qui legatum comitantur, non ut instructior fiat legatio, sed unice ut lucro suo consulant, institores forte et mercatores. Et, quamvis hos saepe defenderint et comitum loco habere voluerint legati, apparet tamen satis eo non pertinere, qui in legati legationisve officio non sunt. Quum autem ea res nonnunquam turbas dederit, optimo exemplo in quibusdam aulis olim receptum fuit, ut legatus teneretur exhibere nomenclaturam comitum suorum. Van Bynkersh. c. 18. prope finem.

f Fitzg. 200. Stra. 797.

g Puff. L. of N. b. 8. c. 9. sec. 6.

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the czar would be induced to believe, that any future requisition of instant death could be complied with; but as the statute has not made the offence felony, of course this punishment cannot extend to the privation of life.

(7) But he must besides be actually and *bonâ fide* a domestic servant. 3 *Burr.* 1676. 1 *Wils.* 20. 78.

III. Upon the same principle the king has also the sole prerogative of making war and peace. For it is held by all the writers on the law of nature and nations, that the right of making war, which by nature subsisted in every individual, is given up by all private persons that enter into society, and is vested in the sovereign power[h]: and this right is given up, not only by individuals, but even by the entire body of people, that are under the dominion of a sovereign. It would indeed be extremely improper, that any number of subjects should have the power of binding the supreme magistrate, and putting him against his will in a state of war. Whatever hostilities therefore may be committed by private citizens, the state ought not to be affected thereby; unless that should justify their proceedings, and thereby become partner in the guilt. Such unauthorized volunteers in violence are not ranked among open enemies, but are treated like pirates and robbers: according to that rule of the civil law[i]; *hostes hi sunt qui nobis, aut quibus nos, publice bellum decrevimus: caeteri latrones aut praedones sunt.* And the reason which is given by Grotius[j], why according to the law [258] of nations a denunciation of war ought always to precede the actual commencement of hostilities, is not so much that the enemy may be put upon his guard, (which is matter rather of magnanimity than right,) but that it may be certainly clear that the war is not undertaken by private persons, but by the will of the whole community; whose right of willing is in this case transferred to the supreme magistrate by the fundamental laws of society. So that, in order to make a war completely effectual, it is necessary with us in England that it be publicly declared and duly proclaimed by the king's authority; and, then, all parts of both the contending nations, from the highest to the lowest, are bound by it. And wherever the right resides of beginning a national war, there also must reside the right of ending it, or the power of mak-

h Puff. l. 8. c. 6. sec. 8. and Barbeyr. in loc.

i Ff. 50. 16. 118.

j de jure b. et p. l. 3. c. 3. sec. 11.

ing peace. And the same check of parliamentary impeachment, for improper or inglorious conduct, in beginning, conducting, or concluding a national war, is in general sufficient to restrain the ministers of the crown from a wanton or injurious exertion of this great prerogative.

IV. But, as the delay of making war may sometimes be detrimental to individuals who have suffered by depredations from foreign potentates, our laws have in some respects armed the subject with powers to impel the prerogative; by directing the ministers of the crown to issue letters of marque and reprisal upon due demand: the prerogative of granting which is nearly related to, and plainly derived from, that other of making war; this being indeed only an incomplete state of hostilities, and generally ending in a formal denunciation of war. These letters are grantable by the law of nations[k], whenever the subjects of one state are oppressed and injured by those of another; and justice is denied by that state to which the oppressor belongs. In this case letters of marque and reprisal (words used as synonimous; and signifying, the latter a taking in return, the former the passing the frontiers in order to such taking[l]) may be obtained, in order to seise the bodies or goods of the subjects of the offending [259] state, until satisfaction be made, wherever they happen to be found. And indeed this custom of reprisals seems dictated by nature herself; for which reason we find in the most ancient times very notable instances of it[m]. But here the necessity is obvious of calling in the sovereign power, to determine when reprisals may be made; else every private sufferer would be a judge in his own cause. In pursuance of which principle, it is with us declared by the statute 4 Hen. V. c. 7. that if any subjects of the realm are

k Ibid. l. 3. c. 2. sec. 4 and 5.

l Dufresne. tit. Marca.

m See the account given by Nestor, in the eleventh book of the Iliad, of the reprisals made by himself on the Epeian nation; from whom he took a multitude of cattle, as a satisfaction for a prize won at the Elian games by his father Neleus, and for debts due to many private subjects of the Pylian kingdom; out of which booty the king took three hundred head of cattle for his own demand, and the rest were equitably divided among the other creditors.

oppressed in the time of truce by any foreigners, the king will grant marque in due form, to all that feel themselves grieved. Which form is thus directed to be observed: the sufferer must first apply to the lord privy-seal; and he shall make out letters of request under the privy-seal; and if, after such request of satisfaction made, the party required do not within convenient time make due satisfaction or restitution to the party grieved, the lord chancellor shall make him out letters of marque under the great seal; and by virtue of these he may attack and seise the property of the aggressor nation, without hazard of being condemned as a robber or pirate (8).

V. Upon exactly the same reason stands the prerogative of granting safe-conducts, without which by the law of nations no member of one society has a right to intrude into another.

(8) The statute of Hen. V. is confined to the time of a truce wherein there is no express mention that all marques and reprisals shall cease. This manner of granting letters of marque I conceive has long been disused, and according to the statute of Hen. V. could only be granted to persons actually aggrieved. But if, during a war, a subject without any commission from the king should take an enemy's ship, the prize would not be the property of the captor, but would be one of the *droits* of admiralty, and would belong to the king, or his grantee the admiral. *Carth.* 399. 2 *Wood.* 433. Therefore, to encourage merchants and others to fit out privateers or armed ships in time of war, by various acts of parliament, the lord high admiral, or the commissioners of the admiralty, are empowered to grant commissions to the owners of such ships; and the prizes captured shall be divided according to a contract entered into between the owners and the captain and crew of the privateer. But the owners, before the commission is granted, shall give security to the admiralty to make compensation for any violation of treaties between those powers with whom the nation is at peace. And by the 24 Geo. III. c. 47. they shall also give security that such armed ship shall not be employed in smuggling. These commissions in the statutes, and upon all occasions, are now called letters of marque. 29 *Geo. II.* c. 34. 19 *Geo. III.* c. 67. *Molloy*, c. 3. *s.* 8. Or sometimes the lords of the admiralty have this authority by a proclamation from the king in council, as was the case in Dec. 1780, to empower them to grant letters of marque to seise the ships of the Dutch

And therefore Puffendorf very justly resolves[n], that it is left in the power of all states, to take such measures about the admission of strangers, as they think convenient; those being ever excepted who are driven on the coast by necessity, or by any cause that deserves pity or compassion. Great tenderness is shewn by our laws, not only to foreigners in distress (as will appear when we come to speak of shipwrecks) but with regard also to the admission of strangers who come spontaneously. For so long as their nation continues at peace with ours, and they themselves behave peaceably, [260] they are under the king's protection; though liable to be sent home whenever the king sees occasion. But no subject of a nation at war with us can, by the law of nations, come into the realm, nor can travel himself upon the high seas, or send his goods and merchandise from one place to another, without danger of being seised by our subjects, unless he has letters of safe-conduct; which by divers ancient statutes[o] must be granted under the king's great seal and enrolled in chancery, or else are of no effect: the king being supposed the best judge of such emergencies, as may deserve exception from the general law of arms. But passports under the king's sign-manual, or licenses from his embassadors abroad, are now more usually obtained, and are allowed to be of equal validity (9).

n Law of N. and N. b. 3. c. 3. sec. 9.
o 15 Hen. VI. c. 3. 18 Hen. VI. c. 8. 20 Hen. VI. c. 1.

(9) In order to prevent foreigners from arriving and continuing in England for the purposes of promoting sedition and confusion in this country, an act was passed 33 Geo. III. c. 4. in which various restraints were imposed upon all aliens whatever.

By the 42 Geo. III. c. 92. that act was repealed, but it substituted provisions nearly similar to those of the former statute.

It directs that all masters of ships, upon their arrival at any place in this realm, shall in writing declare to the officer of the customs, the number of aliens on board, and if any have been previously landed, and their rank and description.

And every alien, upon his landing, shall declare to the same officer, the name of the ship in which he came, his own name, rank, and

INDEED the law of England, as a commercial country, pays a very particular regard to foreign merchants in innumerable instances. One I cannot omit to mention: that by *magna carta*[p] it is provided, that all merchants (unless publicly prohibited before-hand) shall have safe conduct to depart from, to come into, to tarry in, and to go through England, for the exercise of merchandise, without any unreasonable imposts, except in time of war: and, if a war breaks out between us and their country, they shall be attached (if in England) without harm of body or goods, till the king or his chief justiciary be informed how our merchants are treated in the land with which we are at war; and, if ours be secure in that land, they shall be secure in ours. This seems to have been a common rule of equity among all the northern nations; for we learn from Stiernhook[q], that it was a maxim among the Goths and Swedes, "*quam legem exteri nobis posuere, eandem illis ponemus.*" But it is somewhat extraordinary, that it should have found a place in *magna carta*, a mere interior treaty between the king and his natural-born subjects:

p c. 30. q de jure Sueton. l. 3. c. 4.

situation in life, the place from whence he came, and to which he is going, and the name and residence of any person, to whom he is known. For disobedience of the directions of this statute, an alien may be committed to gaol, and in some cases may be transported for life.

This statute contains an important clause, stating that a treaty had been made between his majesty, the French republic, his Catholic majesty, and the Batavian republic, by which it was agreed, that the contracting parties shall, on requisitions made by themselves, or their ministers, deliver up to justice persons accused of the crimes of murder, forgery, or fraudulent bankruptcy committed within the jurisdiction of the requiring party, provided that this shall be done only when the evidence of the criminality shall be so authenticated as that the laws of the country, where the person so accused shall be found, would justify his apprehension and commitment for trial; it then directs that, upon a warrant from one of his majesty's secretaries of state, signifying that such requisition had been made, all justices of the peace might apprehend such offenders, that they may be delivered up to justice.

which occasions the learned Montesquieu to remark with a degree of admiration, "that the English have made the protec-
"tion of *foreign* merchants one of the articles of their
[261] "*national* liberty[r]." But indeed it well justifies another observation which he has made[s], "that the English "know better than any other people upon earth, how to value "at the same time these three great advantages, religion, liberty, "and commerce." Very different from the genius of the Roman people; who in their manners, their constitution, and even in their laws, treated commerce as a dishonorable employment, and prohibited the exercise thereof to persons of birth, or rank, or fortune[t]: and equally different from the bigotry of the canonists, who looked on trade as inconsistent with christianity[u], and determined at the council of Melfi, under pope Urban II. *A. D.* 1090, that it was impossible with a safe conscience to exercise any traffic, or follow the profession of the law[w].

THESE are the principal prerogatives of the king respecting this nation's intercourse with foreign nations; in all of which he is considered as the delegate or representative of his people. But in domestic affairs he is considered in a great variety of characters, and from thence there arises an abundant number of other prerogatives.

I. FIRST, he is a constituent part of the supreme legislative power; and, as such, has the prerogative of rejecting such provisions in parliament, as he judges improper to be passed. The expediency of which constitution has before been evinced at large[x]. I shall only farther remark, that the king is not bound by any act of parliament, unless he be named therein by special and particular words. The most general words that can be devised ("any person or persons, bodies

r Sp. L. 20. 13.

s Ibid. 20. 6.

t Nobiliores natalibus, et honorum luce conspicuos, et patrimonio ditiores, perniciosum urbibus mercimonium exercere prohibemus. C. 4. 63. 3.

u Homo mercator vix aut nunquam potest Deo placere; et ideo nullus christianus debet esse mercator; aut si voluerit esse, projiciatur de ecclesia Dei. Decret. 1. 88. 11.

w Falsa fit poenitentia (laici) cum penitus ab officio curiali vel negotiali non recedit, quae sine peccatis agi ulla ratione non praevalet. Act. Concil. apud Baron. c. 16.

x ch. 2. pag. 154.

"politic, or corporate, &c.") affect not him in the least, if they may tend to restrain or diminish any of his rights or interests[y]. For it would be of most mischievous consequence to the public, if the strength of the executive power were liable to be curtailed without its own express consent, by constructions and implications of the subject. Yet, where an act of parliament is expressly made for the preservation of public rights and the suppression of public wrongs, and does not interfere with the established rights of the crown, it is said to be binding as well upon the king as upon the subject[z]: and, likewise, the king may take the benefit of any particular act, though he be not especially named[a].

II. The king is considered, in the next place, as the generalissimo, or the first in military command, within the kingdom. The great end of society is to protect the weakness of individuals by the united strength of the community: and the principle use of government is to direct that united strength in the best and most effectual manner, to answer the end proposed. Monarchical government is allowed to be the fittest of any for this purpose: it follows therefore, from the very end of its institution, that in a monarchy the military power must be trusted in the hands of the prince.

In this capacity therefore, of general of the kingdom, the king has the sole power of raising and regulating fleets and armies. Of the manner in which they are raised and regulated I shall speak more, when I come to consider the military state. We are now only to consider the prerogative of inlisting and of governing them: which indeed was disputed and claimed, contrary to all reason and precedent, by the long parliament of king Charles I; but, upon the restoration of his son, was solemnly declared by the statute 13 Car. II. c. 6. to be in the king alone: for that the sole supreme government and command of the militia within all his majesty's realms and dominions, and of all forces by sea and land, and of all forts and places of strength, ever was and is the un-

y 11 Rep. 74. z Ibid. 71. a 7 Rep. 32.

doubted right of his majesty, and his royal predecessors, kings and queens of England; and that both or either house of parliament cannot, nor ought to, pretend to the same.

This statute, it is obvious to observe, extends not only to fleets and armies, but also to forts, and other places of strength, within the realm; the sole prerogative as well of erecting, as manning and governing of which, belongs to the king in his capacity of general of the kingdom[b]: and all lands were formerly subject to a tax, for building of castles wherever the king thought proper. This was one of the three things, from contributing to the performance of which no lands were exempted; and therefore called by our Saxon ancestors the *trinoda necessitas: sc. pontis reparatio, arcis construcio, et expeditio contra hostem*[c]. And this they were called upon to do so often, that, as sir Edward Coke from M. Paris assures us[d], there were in the time of Henry II. 1115 castles subsisting in England. The inconveniences of which, when granted out to private subjects, the lordly barons of those times, were severely felt by the whole kingdom; for, as William of Newburgh remarks in the reign of king Stephen, "*erant in Anglia quodammodo tot reges vel potius tyranni, quot* "*domini castellorum:*" but it was felt by none more sensibly than by two succeeding princes, king John and king Henry III. And therefore, the greatest part of them being demolished in the barons' wars, the kings of after-times have been very cautious of suffering them to be rebuilt in a fortified manner: and sir Edward Coke lays it down[e], that no subject can build a castle, or house of strength embattled, or other fortress defensible, without the license of the king; for the danger which might ensue, if every man at his pleasure might do it.

It is partly upon the same, and partly upon a fiscal foundation, to secure his marine revenue, that the king has the

b 2 Inst. 30.

c Cowel's Interp. tit. castellorum operatio. Scld. Jan. Aug. l. 42.

d 2 Inst. 31.

e 1 Inst. 5*l*

prerogative of appointing *ports* and *havens*, or such places only for persons and merchandise to pass into and out of the realm, as he in his wisdom sees proper. By the feodal law all navigable rivers and havens were computed among the *regalia* [f], and were subject to the sovereign of the state. And in England it hath always been holden, that the king is lord of the whole shore [g], and particularly is the guardian of the ports and havens, which are the inlets and gates of the realm [h]: and therefore, so early as the reign of king John, we find ships seised by the king's officers for putting in at a place that was not a legal port [i]. These legal ports were undoubtedly at first assigned by the crown; since to each of them a court of portmote is incident [k], the jurisdiction of which must flow from the royal authority: the *great ports* of the sea are also referred to, as well known and established, by statute 4 Hen. IV. c. 20. which prohibits the landing elsewhere under pain of confiscation: and the statute 1 Eliz. c. 11. recites, that the franchise of lading and discharging had been frequently granted by the crown.

But though the king had a power of granting the franchise of havens and ports, yet he had not the power of resumption, or of narrowing and confining their limits when once established; but any person had a right to load or discharge his merchandise in any part of the haven: whereby the revenue of the customs was much impaired and diminished, by fraudulent landings in obscure and private corners. This occasioned the statutes of 1 Eliz. c. 11. and 13 and 14 Car. II. c. 11. § 14. which enable the crown by commission to ascertain the limits of all ports, and to assign proper wharfs and quays in each port, for the exclusive landing and loading of merchandise.

The erection of beacons, light-houses, and sea-marks, is also a branch of the royal prerogative: whereof the first was

f 2 Feud. t. 56. Crag. 1. 15. 15.
g F. N. B. 113.
h Dav. 9. 56.
i Madox. hist. exch. 530.
k 4 Inst. 148.

anciently used in order to alarm the country, in case of the approach of an enemy; and all of them are signally useful in guiding and preserving vessels at sea by night as well as by day. For this purpose the king hath the exclusive power, by commission under his great seal[l], to cause them to be erected in fit and convenient places[m], as well upon the lands of the subject as upon the demesnes of the crown: which power is usually vested by letters patent in the office of lord high admiral[n]. And by statute 8 Eliz. c. 13. the corporation of the trinity-house are empowered to set up any beacons or sea-marks wherever they shall think them necessary; and if the owner of the land or any other person shall destroy them, or shall take down any steeple, tree, or other known sea-mark, he shall forfeit 100*l.* or in case of inability to pay it, shall be *ipso facto* outlawed.

To this branch of the prerogative may also be referred the power vested in his majesty, by statutes 12 Car. II. c. 4. and 29 Geo. II. c. 16. of prohibiting the exportation of arms or ammunition out of this kingdom, under severe penalties: and likewise the right which the king has, whenever he sees proper, of confining his subjects to stay within the realm, or of recalling them when beyond the seas. By the common law[o], every man may go out of the realm for whatever cause he pleaseth, without obtaining the king's leave; provided he is under no injunction of staying at home: (which liberty was expressly declared in king John's great charter, though left out in that of Henry III.) but, because that every man ought of right to defend the king and his realm, therefore the king at his pleasure may command him by his writ that he go not beyond the seas, or out of the realm, without license; and, if he do the contrary, he shall be punished for disobeying the king's command. Some persons there anciently were, that, by reason of their stations, were under a perpetual prohibition of going abroad without license obtained; among which were

l 3 Inst. 204. 4 Inst. 149.
m Rot. Claus. 1 Ric. II. m. 42. Pryn. on 4 Inst. 136.
n Sid. 158. 4 Inst. 149.
o F. N. B. 85.

reckoned all peers, on account of their being counsellors of the crown; all knights, who were bound to defend the kingdom from invasions; all ecclesiastics, who [266] were expressly confined by the fourth chapter of the constitutions of Clarendon, on account of their attachment in the times of popery to the see of Rome; all archers and other artificers, lest they should instruct foreigners to rival us in their several trades and manufactures. This was law in the times of Britton[p], who wrote in the reign of Edward I: and sir Edward Coke[q] gives us many instances to this effect in the time of Edward III. In the succeeding reign the affair of travelling wore a very different aspect: an act of parliament being made[r], forbidding all persons whatever to go abroad without license; *except* only the lords and other great men of the realm; and true and notable merchants; and the king's soldiers. But this act was repealed by the statute 4 Jac. I. c. 1. And at present every body has, or at least assumes, the liberty of going abroad when he pleases. Yet undoubtedly if the king, by writ of *ne exeat regnum* (10), under his great seal or privy seal,

p c. 123. q 3 Inst. 175. r 5 Ric. II. c. 2.

(10) It is said in lord Bacon's Ordinances, N° 89, that "towards "the latter end of the reign of king James the first this writ was thought "proper to be granted, not only in respect of attempts prejudicial to "the king and state, (in which case the lord chancellor granted it on "application from any of the principal secretaries, without shewing "cause, or upon such information as his lordship should think of "weight,) but also in the case of interlopers in trade, great bankrupts, "in whose estates many subjects might be interested, in duels, and in "other cases that did concern multitudes of the king's subjects."

But in the year 1734, lord Chancellor Talbot declared that "in his "experience he never knew this writ of *ne exeat regnum* granted or "taken out without a bill first filed. It is true, it was originally a state "writ, but for some time, though not very long, it has been made use "of in aid of the subjects for the helping of them to justice; but it "ought not to be made use of where the demand is entirely at law, for "there the plaintiff has bail, and he ought not to have double bail, "both in law and equity." 3 *P. Wms.* 312.

thinks proper to prohibit him from so doing; or if the king sends a writ to any man, when abroad, commanding his return (11), and in either case the subject disobeys; it is a high contempt of the king's prerogative, for which the offender's lands shall be seised till he return; and then he is liable to fine and imprisonment[s].

III. Another capacity, in which the king is considered in domestic affairs, is as the fountain of justice and general conservator of the peace of the kingdom. By the fountain of justice the law does not mean the *author* or *original*, but only the *distributer*. Justice is not derived from the king, as from his *free gift*; but he is the steward of the public, to dispense it to whom it is due[t]. He is not the spring, but the reservoir; from whence right and equity are conducted, by a thousand channels, to every individual. The original power of judicature by the

s 1 Hawk. P. C. 22.

t Ad hoc autem creatus est et electus, ut justitiam faciat universis. Bract. l. 3. tr. 1. c. 9.

The use and object of this writ of *ne exeat regno* in chancery at present is exactly the same as an arrest at law in the commencement of an action, viz. to prevent the party from withdrawing his person and property beyond the jurisdiction of the court, before a judgment could be obtained and carried into execution; so where there is a suit in equity for a demand, for which the defendant cannot be arrested in an action at law, upon an affidavit made that there is reason to apprehend that he will leave the kingdom before the conclusion of the suit, the chancellor by this writ will stop him, and will commit him to prison, unless he produces sufficient sureties that he will abide the event of the suit. See 2 *Com. Dig.* 312. The affidavit must state sufficient proof of the intention of the party to go abroad, and the plaintiff must swear that the defendant is indebted to him a certain sum, which sum is marked upon the writ, and for which security must be found. 3 *Bro.* 370. And if this sum is paid into court, the writ will be discharged. 1 *Ves. Jun.* 96.

(11) The exercise of this prerogative has been long disused, and it is probable that it will never be resumed. For the ancient learning upon it, see 3 Inst. c. 84. against fugitives.

fundamental principles of society, is lodged in the society at large: but as it would be impracticable to render complete justice to every individual, by the people in their collective capacity, therefore every nation has committed that power to certain select magistrates, who with more ease and expedition can hear and determine complaints; and in England this authority has immemorially been exercised by the king or his substitutes. He therefore has alone the right of erecting courts of judicature: for, though the constitution of the kingdom hath intrusted him with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust: it is consequently necessary, that courts should be erected, to assist him in executing this power; and equally necessary, that, if erected, they should be erected by his authority. And hence it is, that all jurisdictions of courts are either mediately or immediately derived from the crown, their proceedings run generally in the king's name, they pass under his seal, and are executed by his officers.

IT is probable, and almost certain, that in very early times, before our constitution arrived at its full perfection, our kings in person often heard and determined causes between party and party (12). But at present, by the long and uniform usage of many ages, our kings have delegated their whole judicial power to the judges of their several courts; which are the grand depositaries of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the crown itself cannot now alter but by act of parliament[u]. And, in order to maintain both the dignity and independence of the judges in the superior courts, it is enacted by the statute 13 W. III. c. 2. that their commissions shall be made (not, as formerly, *durante bene placito*, but) *quamdiu bene se gesserint*, and their salaries ascertained and established; but that it may be lawful to re-

[u] 2 Hawk. P. C. 2.

(12) See 3 vol. 41,

move them on the address of both houses of parliament. And now, by the noble improvements of that law in the statute of 1 Geo. III. c. 23. enacted at the earnest recommendation of the king himself from the throne, the judges are continued in their offices during their good behaviour, notwithstanding any demise of the crown, (which was formerly held[w] immediately to vacate their seats,) (13) and their full salaries are absolutely secured to them during the continuance of their commissions; his majesty having been pleased to declare, that "he looked upon the independence and uprightness of the judges, as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honor of the crown[x]."

[268]

In criminal proceedings, or prosecutions for offences, it would still be a higher absurdity, if the king personally sate in judgment; because in regard to these he appears in another capacity, that of *prosecutor*. All offences are either against the king's peace, or his crown and dignity: and are so laid in every indictment. For though in their consequences they generally seem (except in the case of treason, and a very few others) to be rather offences against the kingdom than the king; yet, as the public, which is an invisible body, has delegated all its power and rights, with regard to the execution of the laws, to one visible magistrate,

w Lord Raym. 747. x Com. Journ. 3 Mar. 1761.

(13) All their commissions became vacant upon the demise of the crown, till they were continued for six months longer by 1 Ann. stat. 1. c. 8. When his majesty was pleased to make the memorable declaration in the text, he introduced it by observing; "Upon granting new "commissions to the judges, the present state of their offices fell natu- "rally under consideration. In consequence of the late act, passed in "the reign of my late glorious predecessor William the third, for set- "tling the succession to the crown in my family, their commissions "have been made during their good behaviour; but notwithstanding "that wise provision, their offices have determined upon the demise "of the crown, or at the expiration of six months afterwards, in every "instance of that nature which has happened."

all affronts to that power, and breaches of those rights, are immediately offences against him, to whom they are so delegated by the public. He is therefore the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law. And this notion was carried so far in the old Gothic constitution, (wherein the king was bound by his coronation oath to conserve the peace,) that in case of any forcible injury offered to the person of a fellow subject, the offender was accused of a kind of perjury, in having violated the king's coronation oath; *dicebatur fregisse juramentum regis juratum*[y]. And hence also arises another branch of the prerogative, that of *pardoning* offences; for it is reasonable that [269] he only who is injured should have the power of forgiving. Of prosecutions and pardons I shall treat more at large hereafter; and only mention them here, in this cursory manner, to shew the constitutional grounds of this power of the crown, and how regularly connected all the links are in this vast chain of prerogative.

In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an over-balance for the legislative. For which reason, by the statute of 16 Car. I. c. 10. which abolished the court of star-chamber, effectual

y Stiernh. de jure Goth. l. 3. c. 3. A notion somewhat similar to this may be found in the Mirror. c. 1. sec. 5. And so also, when the chief justice Thorpe was condemned to be hanged for bribery, he was said *incrementum domini regis fregisse*. Rot. Parl. 2 Edw. III.

care is taken to remove all judicial power out of the hands of the king's privy council; who, as then was evident from recent instances, might soon be inclined to pronounce that for law, which was most agreeable to the prince or his officers. Nothing therefore is more to be avoided, in a free constitution, than uniting the provinces of a judge and a minister of state. And indeed, that the absolute power, claimed and exercised in a neighbouring nation, is more tolerable than that of the eastern empires, is in great measure owing to their having vested the judicial power in their parliaments, a body separate and distinct from both the legislative and executive: and, if ever that nation recovers its former liberty, it will owe it to the efforts of those assemblies. In Turkey, where every thing is centred in the sultan
[270] or his ministers, despotic power is in its meridian, and wears a more dreadful aspect.

A CONSEQUENCE of this prerogative is the legal *ubiquity* of the king. His majesty, in the eye of the law, is always present in all his courts, though he cannot personally distribute justice[z]. His judges are the mirror by which the king's image is reflected. It is the regal office, and not the royal person, that is always present in the court, always ready to undertake prosecutions, or pronounce judgment for the benefit and protection of the subject. And from this ubiquity it follows, that the king can never be nonsuit[a]; for a nonsuit is the desertion of the suit or action by the non-appearance of the plaintiff in court (14). For the same reason also, in the forms of legal proceedings, the king is not said to appear *by his attorney*, as other men do; for in contemplation of law he is always present in court[b].

FROM the same original, of the king's being the fountain of justice, we may also deduce the prerogative of issuing proclamations, which is vested in the king alone. These proclamations have then a binding force, when (as sir Edward

z Fortesc. c. 8. 2 Inst. 186. a Co. Litt. 139. b Finch. L. 81.

(14) But the attorney-general may enter a *non vult prosequi*, which has the effect of a nonsuit. *Co. Litt.* 139.

Coke observes[c]) they are grounded upon and enforce the laws of the realm. For, though the making of laws is entirely the work of a distinct part, the legislative branch, of the sovereign power, yet the manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate. And therefore his constitutions or edicts concerning these points, which we call proclamations, are binding upon the subject, where they do not either contradict the old laws or tend to establish new ones; but only enforce the execution of such laws as are already in being, in such manner as the king shall judge necessary. Thus the established law is, that the king may prohibit any of his subjects from leaving the realm: a proclamation therefore forbidding this in general for three weeks, by laying an embargo upon all shipping in time of war[d], [271] will be equally binding as an act of parliament, because founded upon a prior law. But a proclamation to lay an embargo in time of peace upon all vessels laden with wheat (though in the time of a public scarcity) being contrary to law, and particularly to statute 22 Car. II. c. 13. the advisers of such a proclamation, and all persons acting under it, found it necessary to be indemnified by a special act of parliament, 7 Geo. III. c. 7. A proclamation for disarming papists is also binding, being only in execution of what the legislature has first ordained: but a proclamation for allowing arms to papists, or for disarming any protestant subjects, will not bind; because the first would be to assume a dispensing power, the latter a legislative one; to the vesting of either of which in any single person the laws of England are absolutely strangers. Indeed by the statute 31 Hen. VIII. c. 8. it was enacted, that the king's proclamations should have the force of acts of parliament: a statute, which was calculated to introduce the most despotic tyranny; and which must have proved fatal to the liberties of this kingdom, had it not been luckily repealed in the minority of his successor, about five years after[e].

c 3 Inst. 162. d 4 Mod. 177. 179. e Stat. 1 Edw. VI. c. 12.

IV. The king is likewise the fountain of honor, of office, and of privilege: and this in a different sense from that wherein he is styled the fountain of justice; for here he is really the parent of them. It is impossible that government can be maintained without a due subordination of rank; that the people may know and distinguish such as are set over them, in order to yield them their due respect and obedience; and also that the officers themselves, being encouraged by emulation and the hopes of superiority, may the better discharge their functions: and the law supposes, that no one can be so good a judge of their several merits and services, as the king himself who employs them. It has therefore intrusted with him the sole power of conferring dignities and honors, in confidence that he will bestow them upon none, but such as deserve them. And therefore all degrees of nobility, [272] of knighthood, and other titles, are received by immediate grant from the crown: either expressed in writing, by writs or letters patent, as in the creations of peers and baronets; or by corporeal investiture, as in the creation of a simple knight.

From the same principle also arises the prerogative of erecting and disposing of offices: for honors and offices are in their nature convertible and synonymous. All offices under the crown carry in the eye of the law an honor along with them; because they imply a superiority of parts and abilities, being supposed to be always filled with those that are most able to execute them. And, on the other hand, all honors in their original had duties or offices annexed to them: an earl, *comes*, was the conservator or governor of a county; and a knight, *miles*, was bound to attend the king in his wars. For the same reason therefore that honors are in the disposal of the king, offices ought to be so likewise; and as the king may create new titles, so may he create new offices; but with this restriction, that he cannot create new offices with new fees annexed to them, nor annex new fees to old offices; for this would be a tax upon the subject, which

cannot be imposed but by act of parliament[f]. Wherefore, in 13 Hen. IV, a new office being created by the king's letters patent for measuring cloths, with a new fee for the same, the letters patent were, on account of the new fee, revoked and declared void in parliament.

Upon the same, or a like reason, the king has also the prerogative of conferring privileges upon private persons. Such as granting place or precedence to any of his subjects (15), as shall seem good to his royal wisdom[g]: or such as converting aliens, or persons born out of the king's dominions, into denizens; whereby some very considerable privileges of natural-born subjects are conferred upon them. Such also is the prerogative of erecting corporations; whereby a number of private persons are united and knit together, and enjoy many liberties, powers, and immunities in their politic capacity, which they were utterly incapable of in their natural. Of aliens, denizens, [273] natural-born, and naturalized subjects, I shall speak more largely in a subsequent chapter; as also of corporations at the close of this book of our commentaries. I now only mention them incidentally, in order to remark the king's prerogative of making them; which is grounded upon this foundation, that the king, having the sole administration of the government in his hands, is the best and the only judge, in what capacities, with what privileges, and under what distinctions, his people are the best qualified to serve, and to act under him. A principle, which was carried so far by the imperial law, that it was determined to be the crime of

[f] 2 Inst. 533. [g] 4 Inst. 361.

(15) The king by the common law could have created a duke, earl, &c. and could have given him precedence before all others of the same rank, a prerogative not unfrequently exercised in ancient times; but it was restrained by the 31 Hen. VIII. c. 10. which settles the place or precedence of all the nobility and great officers of state. This statute does not extend to Ireland, where the king still retains his prerogative without any restriction, except the dread of the unpopularity which would now result from the exertion of it.

sacrilege, even to doubt whether the prince had appointed proper officers in the state [h].

V. Another light, in which the laws of England considered the king with regard to domestic concerns, is as the arbiter of commerce. By commerce, I at present mean domestic commerce only. It would lead me into too large a field, if I were to attempt to enter upon the nature of foreign trade, its privileges, regulations, and restrictions; and would be also quite beside the purpose of these commentaries, which are confined to the laws of England: whereas no municipal laws can be sufficient to order and determine the very extensive and complicated affairs of traffic and merchandise; neither can they have a proper authority for this purpose. For, as these are transactions carried on between subjects of independent states, the municipal laws of one will not be regarded by the other. For which reason the affairs of commerce are regulated by a law of their own, called the law merchant or *lex mercatoria*, which all nations agree in and take notice of. And in particular it is held to be part of the law of England, which decides the causes of merchants by the general rules which obtain in all commercial countries; and that often even in matters relating to domestic trade, as for instance with regard to the drawing, the acceptance, and the transfer, of inland bills of exchange [i].

[274] With us in England, the king's prerogative, so far as it relates to mere domestic commerce, will fall principally under the following articles:

First, the establishment of public marts, or places of buying and selling, such as markets and fairs, with the tolls thereunto belonging. These can only be set up by virtue of the king's grant, or by long and immemorial usage and prescription, which presupposes such a grant [k]. The limitation of these public resorts, to such time and such place as

h Disputare de principali judicio non oportet; sacrilegii enim instar est, dubitare an is dignus sit, quem elegerit imperator. C. 9. 29. 3.

i Co. Litt. 172. Ld. Raym. 181. 1542.

k 2 Inst. 220.

may be most convenient for the neighbourhood, forms a part of œconomics, or domestic polity; which, considering the kingdom as a large family, and the king as the master of it, he clearly has a right to dispose and order as he pleases.

SECONDLY, the regulation of weights and measures. These, for the advantage of the public, ought to be universally the same throughout the kingdom; being the general criterions which reduce all things to the same or an equivalent value. But, as weight and measure are things in their nature arbitrary and uncertain, it is therefore expedient that they be reduced to some fixed rule or standard: which standard it is impossible to fix by any written law or oral proclamation; for no man can, by words only, give another an adequate idea of a foot-rule, or a pound-weight. It is therefore necessary to have recourse to some visible, palpable, material standard; by forming a comparison with which, all weights and measures may be reduced to one uniform size: and the prerogative of fixing this standard our ancient law vested in the crown, as in Normandy it belonged to the duke[l]. This standard was originally kept at Winchester: and we find in the laws of king Edgar[m], near a century before the conquest, an injunction that the one measure, which was kept at Winchester, should be observed throughout the realm. Most nations have regulated the standard of measures of length by comparison with the parts of the human body; as the [275] palm, the hand, the span, the foot, the cubit, the ell, (*ulna*, or arm,) the pace, and the fathom. But, as these are of different dimensions in men of different proportions, our ancient historians[n] inform us, that a new standard of longitudinal measure was ascertained by king Henry the first; who commanded that the *ulna* or ancient ell, which answers to the modern yard, should be made of the exact length of his own arm. And, one standard of measures of length being gained, all others are easily derived from thence; those of greater length by multiplying, those of less by subdividing, that original standard.

l Gr. Coustum. c. 16.
m cap. 8.
n Will. Malmsb. in vita Hen. I. Spelm. Hen. I. apud Wilkins. 299.

Thus, by the statute called *compositio ulnarum et perticarum*, five yards and a half make a perch; and the yard is subdivided into three feet, and each foot into twelve inches; which inches will be each of the length of three grains of barley. Superficial measures are derived by squaring those of length; and measures of capacity by cubing them. The standard of weights was originally taken from corns of wheat, whence the lowest denomination of weights we have is still called a grain; thirty-two of which are directed, by the statute called *compositio mensurarum*, to compose a penny weight, whereof twenty make an ounce, twelve ounces a pound, and so upwards. And upon these principles the first standards were made; which, being originally so fixed by the crown, their subsequent regulations have been generally made by the king in parliament. Thus, under king Richard I, in his parliament holden at Westminster, *A. D.* 1197, it was ordained that there should be only one weight and one measure throughout the kingdom, and that the custody of the assize or standard of weights and measures should be committed to certain persons in every city and borough[o]; from whence the ancient office of the king's alnagar seems to have been derived, whose duty it was, for a certain fee, to measure all cloths made for sale, till the office was abolished by the statute 11 & 12 W. III. c. 20. In king John's time this ordinance of king Richard was fre-
[276] quently dispensed with for money[p]; which occasioned a provision to be made for enforcing it, in the great charters of king John and his son[q]. These original standards were called *pondus regis*[r], and *mensura domini regis*[s]; and are directed by a variety of subsequent statutes to be kept in the exchequer, and all weights and measures to be made conformable thereto[t]. But, as sir Edward Coke observes[u] though this hath so often by authority of parliament been

o Hoved. Matth. Paris.
p Hoved. A. D. 1201.
q 9 Hen. III. c. 25.
r Plac. 35 Edw. I. apud Cowel's Interpr. tit. pondus regis.
s Flet. 2. 12.
t 14 Edw. III. st. 1. c. 12. 25 Edw. III. st. 5. c. 10. 16 Rich. II. c. 3. 9 Hen. VI. c. 5. 11 Hen. VI. c. 8. 11 Hen. VII. c. 4. 22 Car. II. c. 8.
u 2 Inst. 41.

enacted, yet it could never be effected; so forcible is custom with the multitude (16).

THIRDLY, as money is the medium of commerce, it is the king's prerogative, as the arbiter of domestic commerce, to give it authority or make it current. Money is an universal medium, or common standard, by comparison with which the value of all merchandise may be ascertained: or it is a sign, which represents the respective values of all commodities. Metals are well calculated for this sign, because they are durable and are capable of many subdivisions: and a precious metal is still better calculated for this purpose, because it is the most portable. A metal is also the most proper for a common measure, because it can easily be reduced to the same standard in all nations: and every particular nation fixes on it its own impression, that the weight and standard (wherein consists the intrinsic value) may both be known by inspection only.

As the quantity of precious metals increases, that is, the more of them there is extracted from the mine, this universal medium or common sign will sink in value, and grow less

(16) The regulation of weights and measures cannot with propriety be referred to the king's prerogative; for from *magna charta* to the present time there are above twenty acts of parliament to fix and establish the standard and uniformity of weights and measures. Two important cases upon this subject have lately been determined by the court of king's bench; one was, that although there had been a custom in a town to sell butter by eighteen ounces to the pound, yet the jury of the court-leet were not justified in seising the butter of a person who sold pounds less than that, but more than sixteen ounces each, the statutable weight. 3 *T. R.* 271. In the other it was determined, that no practice or usage could countervail the statutes 22 Car. II. c. 8. and 22 and 23 Car. II. c. 12. which enact, that if any person shall either sell or buy grain or salt by any other measure than the Winchester bushel, he shall forfeit forty shillings, and also the value of the grain or salt so sold or bought; one half to the poor, the other to the informer. *The King and Major*, 4 *T. R.* 750. 5 *T. R.* 353.

precious. Above a thousand millions of bullion are calculated to have been imported into Europe from America within less than three centuries: and the quantity is daily increasing.

[277] The consequence is, that more money must be given now for the same commodity than was given an hundred years ago. And, if any accident were to diminish the quantity of gold and silver, their value would proportionably rise. A horse, that was formerly worth ten pounds, is now perhaps worth twenty; and, by any failure of current specie, the price may be reduced to what it was. Yet is the horse in reality neither dearer nor cheaper at one time than another: for, if the metal which constitutes the coin was formerly twice as scarce as at present, the commodity was then as dear at half the price, as now it is at the whole (17).

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(17) In considering the prices of articles in ancient times, regard must always be had to the weight of the shilling, or the quantity of silver which it contained at different periods. From the conquest till the 20th year of Edw. III. a pound sterling was actually a pound troy weight of silver, which was divided into twenty shillings; so if ten pounds at that time were the price of a horse, the same quantity of silver was paid for it as is now given, if its price is thirty pounds.

This therefore is one great cause of the apparent difference in the prices of commodities in ancient and modern times. About the year 1347, Edward III. coined twenty-two shillings out of a pound; and five years afterwards he coined twenty-five shillings out of the same quantity. Henry V. in the beginning of his reign, divided the pound into thirty shillings, and then of consequence each shilling was double the weight of a shilling at present. Henry VII. increased the number to forty, which was the standard number till the beginning of the reign of Elizabeth. She then coined a pound of sterling silver into sixty-two shillings, which division has ever since remained without alteration; so every ounce of coined silver since that time has been equal to five shillings and two-pence. (*See* MONEY *in the Index to* Hume's *Hist.*) Dr. Adam Smith, at the end of his first volume, has given tables specifying the average prices of wheat for five hundred and fifty years back, and has reduced for each year the money of that time into the

The coining of money is in all states the act of the sovereign power; for the reason just mentioned, that its value may be known on inspection. And with respect to coinage in general, there are three things to be considered therein; the materials, the impression, and the denomination.

With regard to the materials, sir Edward Coke lays it down[w], that the money of England must either be of gold or silver: and none other was ever issued by the royal autho-

[w] 2 Inst. 577.

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money of the present day. But in his calculation he has called the pound since Elizabeth's time sixty shillings. Taking it at that rate, we may easily find the equivalent in modern money of any sum in ancient time, if we know the number of shillings which weighed a pound, by this simple rule: as the number of shillings in a pound at that time is to sixty, so is any sum at that time to its equivalent at present; as for instance, in the time of Henry V. as thirty shillings are to sixty shillings now, so ten pounds then were equal to twenty pounds of present money. The increase in the quantity of the precious metals does not necessarily increase the price of articles of commerce; for if the quantities of these articles are augmented in the same proportion as the quantity of money, it is clear there will be the same use, demand, or price for money as before, and no effect will be produced in the price of commodities.

If gold and silver could have been kept in the country, the immense increase of paper currency, or substitution of paper for coin, would have diminished its value, and have increased the prices of labor and commodities far beyond the effect that has been produced by the discovery of the mines in America. The effect they have produced is general, and extended to the whole world; but the increase of our paper has only a tendency to lessen the value of money at home, which never can take place to any great degree, as it will naturally seek a better market, or be carried where more will be given for it; and by the substitution of a cheaper medium of commerce, the difference in value is added to the capital or to the real strength of the nation. Gold and silver form an insignificant part of the real wealth of a commercial country. The whole quantity of specie in the country has been estimated at about twenty millions only, much less than what is raised in one year for the support of government.

rity till 1672, when copper farthings and half-pence were coined by king Charles the second, and ordered by proclamation to be current in all payments, under the value of sixpence, and not otherwise. But this copper coin is not upon the same footing with the other in many respects, particularly with regard to the offence of counterfeiting it. And, as to the silver coin, it is enacted by statute 14 Geo. III. c. 42. that no tender of payment in silver money, exceeding twenty-five pounds at one time, shall be a sufficient tender in law, for more than its value by weight, at the rate of 5*s*. 2*d*. an ounce (18).

As to the impression, the stamping thereof is the unquestionable prerogative of the crown: for, though divers bishops and monasteries had formerly the privilege of coining money, yet, as sir Matthew Hale observes[w], this was usually done by special grant from the king, or by prescription [278] which supposes one; and therefore was derived from, and not in derogation of, the royal prerogative. Besides that they had only the profit of the coinage, and not the power of instituting either the impression or denomination; but had usually the stamp sent them from the exchequer.

THE denomination, or the value for which the coin is to pass current, is likewise in the breast of the king; and, if any unusual pieces are coined, that value must be ascertained by proclamation. In order to fix the value, the weight and the fineness of the metal are to be taken into consideration together. When a given weight of gold or silver is of a given fineness, it is then of the true standard[x], and called

w 1 Hist. P. C. 191.

x This standard hath been frequently varied in former times; but hath for many years past been thus invariably settled. The pound troy of gold, consisting of twenty-two carats (or twenty fourth parts) fine, and two of alloy, is divided into forty-four guineas and a half of the present value of 12*s*. each. And the pound-

(18) This was a clause in a temporary act, which was continued till 1783, since which time I do not find that it has been revived.

esterling or sterling metal; a name for which these are various reasons given [y], but none of them entirely satisfactory. And of this sterling or esterling metal all the coin of the kingdom must be made, by the statute 25 Edw. III. c. 13. So that the king's prerogative seemeth not to extend to the debasing or enhancing the value of the coin, below or above the sterling value [z]: though sir Matthew Hale [a] appears to be of another opinion (21). The king may also, by his proclama-

troy of silver, consisting of eleven ounces and two penny weights pure, and eighteen penny weights alloy, is divided into sixty-two shillings. (See Folkes on English coin.) (19)

y Spelm. Gloss. 203. Dufresne, III. 165. The most plausible opinion seems to be that adopted by those two etymologists, that the name was derived from the *Esterlingi*, or Easterlings; as those Saxons were anciently called, who inhabited that district of Germany, now occupied by the Hanse-towns and their appendages; the earliest traders in modern Europe (20).

z 2 Inst. 577.

a 1 Hal. P. C. 194.

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(19) Dr. Adam Smith, in his inestimable work, the Inquiry into the Nature and Causes of the Wealth of Nations, 1 vol. 39. tells us, that the "English pound sterling in the time of Edw. I. contained a pound "Tower-weight of silver of a known fineness. The Tower pound "seems to have been something more than the Roman pound, and "something less than the Troyes pound. This last was not introduced "into the mint of England till the 18th of Hen. VIII. The French "livre contained in the time of Charlemagne a pound Troyes weight "of silver of a known fineness. The fair of Troyes in Champaign was "at that time frequented by all the nations of Europe, and the weights "and measures of so famous a market were generally known and "esteemed."

(20) Camden, in his description of Scotland, says, that it has been erroneously supposed that the word sterling comes from Stirling in Scotland. *A Germanis enim, quos Angli Esterlingi ab orientali situ vocarunt, facta est appellatio, quos Johannes rex ad argentum in suam puritatem redigendum primus evocavit, et ejusmodi nummis Esterlingi in antiquis scriptis semper concipiuntur.* P. 11.

(21) Lord Hale refers to the case of mixed money in Davies's Reports, 48. in support of his opinion. A person in Ireland had borrowed 100*l.* of sterling money, and had given a bond to repay it on a certain future day. In the mean time queen Eliz. for the

tion, legitimate foreign coin, and make it current here; declaring at what value it shall be taken in payments[b]. But this, I apprehend, ought to be by comparison with the standard of our own coin; otherwise the consent of parliament will be necessary. There is at present no such legitimated money; Portugal coin being only current by private consent, [279] so that any one who pleases may refuse to take it in payment. The king may also at any time decry, or cry down, any coin of the kingdom, and make it no longer current[c] (22).

V. The king is, lastly, considered by the laws of England as the head and supreme governor of the national church.

To enter into the reasons upon which this prerogative is founded is matter rather of divinity than of law. I shall therefore only observe that by statute 26 Hen. VIII. c. 1. (reciting that the king's majesty justly and rightfully is and ought to be the supreme head of the church of England; and so had been recognised by the clergy of this kingdom in their convocation) it is enacted that the king shall be reputed the

b Ibid. 197. c 1 Hal. P. C. 197.

purpose of paying her armies and creditors in Ireland, had coined mixed or base money, and by her proclamation had ordered it to pass current, and had cried down the former coin. The debtor on the appointed day tendered 100*l.* in this base coin; and it was determined upon great consideration that it was a legal tender, and that the lender, was obliged to receive it: natural equity would have given a different decision.

This act of queen Elizabeth does but ill correspond with the flattering inscription upon her tomb: *Religio reformata, pax fundata, moneta ad suum valorem reducta, &c.* 2 Inst. 578.

(22) All officers of the revenue are required to cut every piece of gold coin tendered to them, if it is not of the current weight according to the king's proclamation 14 Geo. III. c. 70. And by 13 Geo. III. c. 71. any person may cut counterfeit gold money, or what has been unlawfully diminished.

only supreme head in earth of the church of England, and shall have annexed to the imperial crown of this realm, as well the title and style thereof, as all jurisdictions, authorities, and commodities, to the said dignity of supreme head of the church appertaining. And another statute to the same purport was made, 1 Eliz. c. 1. (23)

In virtue of this authority the king convenes, prorogues, restrains, regulates, and dissolves all ecclesiastical synods or convocations. This was an inherent prerogative of the crown, long before the time of Henry VIII, as appears by the statute 8 Hen. VI. c. 1. and the many authors, both lawyers and historians, vouched by sir Edward Coke[d]. So that the statute 25 Hen. VIII. c. 19. which restrains the convocation from making or putting in execution any canons repugnant to the king's prerogative, or the laws, customs, and statutes of the realm, was merely declaratory of the old common law[e]: that part of it only being new, which makes the king's royal assent actually necessary to the validity of every canon. The convocation or ecclesiastical synod, in England, differs considerably in its constitution from the synods of other christian kingdoms: those consisting wholly of bishops; whereas with us the convocation is the miniature of a parliament, wherein the archbishop presides with regal state; the upper house of bishops represents the house of lords; and the lower house, com- [280]

d 4 Inst. 322, 323. e 12 Rep. 72.

(23) As queen Mary by 1 & 2 Ph. & M. c. 8. had repealed all the statutes made in the time of her father derogatory to the see of Rome, and had fully reinstated the pope in all his former power and jurisdiction in this country; queen Elizabeth, to shew her attachment to the protestant cause, by the first parliamentary act of her reign repealed this statute of queen Mary, and revived all the statutes relating to the church passed in the time of Henry VIII. This proves how little at that time depended upon the authority of parliament, which could accede to such immense revolutions in the course of four or five years.

posed of representatives of the several dioceses at large, and of each particular chapter therein, resembles the house of commons with its knights of the shire and burgesses[f]. This constitution is said to be owing to the policy of Edward I: who thereby at one and the same time let in the inferior clergy to the privileges of forming ecclesiastical canons, (which before they had not,) and also introduced a method of taxing ecclesiastical benefices, by consent of convocation[g] (24).

f In the diet of Sweden, where the ecclesiastics form one of the branches of the legislature, the chamber of the clergy resembles the convocation of England. It is composed of the bishops and superintendants; and also of deputies, one of which is chosen by every ten parishes or rural deanery. Mod. Un. Hist. xxxiii. 18.

g Gilb. Hist. of Exch. c. 4.

(24) From the learned Commentator's text, the student would perhaps be apt to suppose that there is only one convocation at a time. But the king, before the meeting of every new parliament, directs his writ to each archbishop, to summon a convocation in his peculiar province.

Godolphin says, that the convocation of the province of York constantly corresponds, debates, and concludes the same matters with the provincial synod of Canterbury, *God.* 99. But they are certainly distinct and independent of each other; and when they used to tax the clergy, the different convocations sometimes granted different subsidies. In the 22 Hen. VIII. the convocation of Canterbury had granted the king one hundred thousand pounds; in consideration of which an act of parliament was passed, granting a free pardon to the clergy for all spiritual offences, but with a proviso that it should not extend to the province of York, unless its convocation would grant a subsidy in proportion, or unless its clergy would bind themselves individually to contribute as bountifully. This statute is recited at large in *Gib. Cod.* 77.

All deans and archdeacons are members of the convocation of their province; each chapter sends one proctor or representative, and the parochial clergy in each diocese in Canterbury two proctors; but, on account of the small number of dioceses in the province of York, each archdeaconry elects two proctors. In York the convocation consists only of one house; but in Canterbury there are two houses, of which the twenty-two bishops form the upper house; and before the reformation, abbots, priors, and other mitred prelates, sat with the bishops.

From this prerogative also, of being the head of the church, arises the king's right of nomination to vacant bishopricks, and certain other ecclesiastical preferments; which will more properly be considered when we come to treat of the clergy. I shall only here observe, that this is now done in consequence of the statute 25 Hen. VIII. c. 20.

As head of the church, the king is likewise the *dernier resort* in all ecclesiastical causes; an appeal lying ultimately to him in chancery from the sentence of every ecclesiastical judge: which right was restored to the crown by statute 25 Hen. VIII. c. 19. as will more fully be shewn hereafter (25).

The lower house of convocation in the province of Canterbury consists of twenty-two deans, fifty-three archdeacons, twenty-four proctors for the chapters, and forty-four proctors for the parochial clergy. By 8 Hen. VI. c. 1. the clergy in their attendance upon the convocation have the same privilege in freedom from arrest as the members of the house of commons in their attendance upon parliament. *Burn. Con.* 1 *Bac. Abr.* 610.

(25) By that statute it is declared, that for the future no appeals from the ecclesiastical courts of this realm should be made to the pope, but that an appeal from the archbishop's courts should lie to the king in chancery; upon which the king, as in appeals from the admiral's court, should by a commission appoint certain judges or delegates finally to determine such appeals. See 3d vol. p. 66.

CHAPTER THE EIGHTH.

OF THE KING'S REVENUE.

HAVING, in the preceding chapter, considered at large those branches of the king's prerogative, which contribute to his royal dignity, and constitute the executive power of the government, we proceed now to examine the king's *fiscal* prerogatives, or such as regard his *revenue;* which the British constitution hath vested in the royal person, in order to support his dignity and maintain his power: being a portion which each subject contributes of his property, in order to secure the remainder.

THIS revenue is either ordinary, or extraordinary. The king's ordinary revenue is such, as has either subsisted time out of mind in the crown; or else has been granted by parliament, by way of purchase or exchange for such of the king's inherent hereditary revenues, as were found inconvenient to the subject.

WHEN I say that it has subsisted time out of mind in the crown, I do not mean that the king is at present in the actual possession of the whole of this revenue. Much (nay, the greatest part) of it is at this day in the hands of subjects; to whom it has been granted out from time to time by the kings of England: which has rendered the crown in some measure dependent on the people for its ordinary support and subsistence. So that I must be obliged to recount, as part of the royal revenue, what lords of manors and other subjects frequently look upon to be their own absolute inherent rights; because they are and have been vested in them and their ancestors for ages, though in reality originally derived from the grants of our ancient princes.

I. The first of the king's ordinary revenues, which I shall take notice of, is of an ecclesiastical kind; (as are also the three succeeding ones;) viz. the custody of the temporalties of bishops: by which are meant all the lay revenues, lands, and tenements (in which is included his barony) which belong to an archbishop's or bishop's see. And these upon the vacancy of the bishoprick are immediately the right of the king, as a consequence of his prerogative in church matters; whereby he is considered as the founder of all archbishopricks and bishopricks, to whom during the vacancy they revert. And for the same reason, before the dissolution of abbeys, the king had the custody of the temporalties of all such abbeys and priories as were of royal foundation (but not of those founded by subjects) on the death of the abbot or prior[a]. Another reason may also be given, why the policy of the law hath vested this custody in the king; because as the successor is not known, the lands and possessions of the see would be liable to spoil and devastation, if no one had a property therein. Therefore the law has given the king, not the temporalties themselves, but the *custody* of the temporalties, till such time as a successor is appointed; with power of taking to himself all the intermediate profits, without any account of the successor; and with the right of presenting (which the crown very frequently exercises) to such benefices and other preferments as fall within the time of vacation[b]. This revenue is of so high a nature, that it could not be granted out to a subject, before, or even after, it accrued: but now by the statute 15 Edw. III. st. 4. c. 4 & 5. the king may, after the vacancy, lease the temporalties to the dean and chapter; saving to himself all advowsons, escheats, and the like. Our ancient kings, and particularly William Rufus, were not only remarkable for keeping the bishoprics a long time vacant, for the sake of enjoying the temporalties, but also committed horrible waste on the woods and other parts of the estate; and to crown all, would never, when the see was filled up, restore to the bishop his temporalties again, un-

a 2 Inst. 15. b Stat. 17 Edw. II. c. 14. F. N. B. 32.

less he purchased them at an exorbitant price. To remedy which, king Henry the first[c] granted a charter at the beginning of his reign, promising neither to sell, nor let to farm, nor take any thing from, the domains of the church, till the successor was installed (1). And it was made one of the articles of the great charter[d], that no waste should be committed in the temporalties of bishopricks, neither should the custody of them be sold. The same is ordained by the statute of Westminster the first[e]; and the statute 14 Edw. III. st. 4. c. 4. (which permits, as we have seen, a lease to the dean and chapter), is still more explicit in prohibiting the other exactions. It was also a frequent abuse, that the king would for trifling, or no causes, seise the temporalties of bishops, even during their lives, into his own hands: but this is guarded against by statute 1 Edw. III. st. 2. c. 2.

THIS revenue of the king, which was formerly very considerable, is now by a customary indulgence almost reduced to nothing: for, at present, as soon as the new bishop is consecrated and confirmed, he usually receives the restitution of his temporalties quite entire, and untouched, from the king; and at the same time does homage to his sovereign: and then, and not sooner, he has a fee-simple in his bishoprick, and may maintain an action for the profits[f].

II. THE king is entitled to a corody, as the law calls it, out of every bishoprick, that is, to send one of his chaplains to be maintained by the bishop, or to have a pension allowed him till the bishop promotes him to a benefice[g]. This is also in the nature of an acknowledgment to the king, as founder of the see, since he had formerly the same corody or pension from every abbey or priory of royal foundation. It is, I apprehend, now fallen into total disuse: though sir

c Matt. Paris.
d 9 Hen. III. c. 5.
e 3 Edw. I. c. 21.
f Co. Litt. 67. 341.
g F. N. B. 230.

(1) But queen Elizabeth kept the see of Ely vacant 19 years, in order to retain the revenue. *Strype*, 4 vol. 351.

Matthew Hale says [h], that it is due of common right, and that no prescription will discharge it.

III. The king also (as was formerly observed [i]) is entitled to all the tithes arising in extraparochial places [k]: though perhaps it may be doubted how far this article, as well as the last, can be properly reckoned a part of the king's own royal revenue: since a corody supports only his chaplains, and these extraparochial tithes are held under an implied trust, that the king will distribute them for the good of the clergy in general. [284]

IV. The next branch consists in the first-fruits, and tenths, of all spiritual preferments in the kingdom; both of which I shall consider together.

These were originally a part of the papal usurpations over the clergy of this kingdom; first introduced by Pandulph the pope's legate, during the reigns of king John and Henry the third, in the see of Norwich; and afterwards attempted to be made universal by the popes Clement V. and John XXII, about the beginning of the fourteenth century. The first-fruits, *primitiae*, or *annates*, were the first year's whole profits of the spiritual preferment, according to a rate or *valor* made under the direction of pope Innocent IV. by Walter bishop of Norwich in 38 Hen. III, and afterwards advanced in value by commission from pope Nicholas III, *A. D.* 1292, 20 Edw. I [l]: which valuation of pope Nicholas is still preserved in the exchequer [m]. The tenths, or *decimae*, were the tenth part of the annual profit of each living by the same valuation; which was also claimed by the holy see, under no better pretence than a strange misapplication of that precept of the Levitical law, which directs [n], that the Levites "should offer the tenth part of their tithes as a "heave-offering to the Lord, and give it to Aaron the *high* "priest." But this claim of the pope met with a vigorous

h Notes on F. N. B. above cited.
i page 113.
k 2 Inst. 647.
l F. N. B. 176.
m 3 Inst. 154.
n Numb. xviii. 26.

resistance from the English parliament; and a variety of acts were passed to prevent and restrain it, particularly the statute 6 Hen. IV. c. 1. which calls it a horrible mischief and damnable custom. But the popish clergy, blindly devoted to the will of a foreign master, still kept it on foot; sometimes more secretly, sometimes more openly and avowedly: so that in the reign of Henry VIII, it was computed, that in the compass of fifty years 800,000 ducats had been sent to Rome for first-fruits only. And, as the clergy expressed this willingness to contribute so much of their income to the head of the church, it was thought proper (when in the same reign the papal power was abolished, and the king was declared the head of the church of England) to annex this revenue to the crown; which was done by statute 26 Hen. VIII. c. 3. (confirmed by statute 1 Eliz. c. 4.) and a new *valor beneficiorum* was then made, by which the clergy are at present rated (2).

By these last mentioned statutes all vicarages under ten pounds a year, and all rectories under ten marks, are discharged from the payment of first-fruits: and if, in such livings as continue chargeable with this payment, the incumbent lives but half a year, he shall pay only one quarter of his first-fruits; if but one whole year, then half

(2) When the first-fruits and tenths were transferred to the crown of England, by 26 Hen. VIII. c. 3. at the same time it was enacted, that commissioners should be appointed in every diocese, who should certify the value of every ecclesiastical benefice and preferment in the respective dioceses; and according to this valuation, the first-fruits and tenths were to be collected and paid in future. This *valor beneficiorum* is what is commonly called the King's Books; a transcript of which is given in Ecton's Thesaurus, and Bacon's Liber Regis.

of them; if a year and a half, three quarters; and if two years, then the whole; and not otherwise (3). Likewise by the statute 27 Hen. VIII. c. 8. no tenths are to be paid for the first year, for then the first-fruits are due: and by other statutes of queen Anne, in the fifth and sixth years of her reign, if a benefice be under fifty pounds *per annum* clear yearly value, it shall be discharged of the payment of first-fruits and tenths (4).

THUS the richer clergy, being, by the criminal bigotry of their popish predecessors, subjected at first to a foreign exaction, were afterwards, when that yoke was shaken off, liable to a like misapplication of their revenues, through the rapacious disposition of the then reigning monarch: till at length the piety of queen Anne restored to the church what had been thus indirectly taken from it. This she did, not [286] by remitting the tenths and first-fruits entirely; but, in a spirit of the truest equity, by applying these superfluities of the larger benefices to make up the deficiencies of the smaller. And to this end she granted her royal charter, which was confirmed by the statute 2 Ann. c. 11. whereby all the revenue of first-fruits and tenths is vested in trustees for

(3) The archbishops and bishops have four years allowed for the payment, and shall pay one quarter every year, if they live so long upon the bishoprick; but other dignitaries in the church pay theirs in the same manner as rectors and vicars.

(4) After queen Anne had appropriated the revenue arising from the payment of first-fruits and tenths to the augmentation of small livings, it was considered a proper extension of this principle to exempt the smaller livings from the incumbrance of those demands; and, for that end, the bishops of every diocese were directed to inquire and certify into the exchequer what livings did not exceed 50*l.* a year according to the improved value at that time; and it was further provided, that such livings should be *discharged* from those dues in future.

ever, to form a perpetual fund for the augmentation of poor livings. This is usually called queen Anne's bounty, which has been still farther regulated by subsequent statutes[o] (5).

[o] 5 Ann. c. 24. 6 Ann. c. 27. 1 Geo. I. st. 2. c. 10. 3 Geo. I. c. 10.

(5) These trustees were erected into a corporation, and have authority to make rules and orders for the distribution of this fund. The principal rules they have established are, that the sum to be allowed for each augmentation, shall be 200*l.* to be laid out in land, which shall be annexed for ever to the living; and they shall make this donation, first, to all livings not exceeding 10*l.* a year; then to all livings not above 20*l.*; and so in order, whilst any remain under 50*l.* a year. But when any private benefactor will advance 200*l.* the trustees will give another 200*l.* for the advancement of any living not above 45*l.* a year, though it should not belong to that class of livings which they are then augmenting. 2 *Burn. Ec. L.* 260.

Though this was a splendid instance of royal munificence, yet its operation is slow and inconsiderable; for the number of livings certified to be under 50*l.* a year, was no less than 5597. of which 2538 did not exceed 20*l.* a year each, and 1933 between 30*l.* and 50*l.* a year, and the rest between 20*l.* and 30*l.*; so that there were 5597 benefices in this country which had less than 23*l.* a year each upon an average. Dr. Burn calculates that from the fund alone, it will require 339 years from the year 1714, when it commenced, before all these livings can be raised to 50*l.* And if private benefactors should contribute half as much as the fund, (which is very improbable,) it will require 226 years. But even taking this supposition to have been true ever since the establishment, it will follow, that the wretched pittance from each of 5597 livings, both from the royal bounty and private benefaction, cannot, upon an average, have yet been augmented 9*l.* a year. 2 *Burn. E. L.* 268. Yet it must be observed, that, in this calculation, he has not taken into consideration the great increase in the rentals of all estates since the valuation of these small livings was made in the time of queen Anne. Dr. Burn computes the clear amount of the bounty to make 55 augmentations yearly, that is, at 11,000*l.* a year; but Sir John Sinclair, Hist. Rev. 3 part, 198. says, that "this branch of the revenue "amounted to about 14,000*l.* *per annum*; and on the 1st of January "1735, the governors of that charity possessed, besides from savings

V. The next branch of the king's ordinary revenue (which, as well as the subsequent branches, is of a lay or temporal

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"and private benefactions, the sum of 152,500*l.* of old South Sea "annuities, and 4857*l.* of cash in the hands of their treasurer: the "state of that fund has of late years been carefully concealed; but it "probably yields, at present, from 40 to 50 thousand pounds *per* "*annum.*" This conjecture must certainly be very wide of the truth of the case; for the source of this fund is fixed and permanent, except the variation depending upon the contingency of vacancies, which will be more or fewer in different years. And what object can the commissioners have in the accumulation of this fund? For that accumulation can only arise by depriving the poor clergy of the assistance which was intended them, and to enrich the successor at the expense of the wretched incumbent of the present day. The condition of the poor clergy in this country certainly requires some further national provision. Neither learning, religion, nor good morals, can secure poverty from contempt in the minds of the vulgar. The immense inequality in the revenues of the ministers of the gospel, not always resulting from piety and merit, naturally excite discontent and prejudices against the present establishment of the church. If the whole of the profits and emoluments of every benefice for one year were appropriated to this purpose, an effect would be produced in 20 or 30 years, which will require 300 by the present plan. This was what was originally understood by the first-fruits, and what actually, within the last 300 years, was paid and carried out of the kingdom to support the superstition and folly of popery. If upon any promotion to a benefice it was provided that there should be no vacancy or cession of former preferment till the end of the year, who could complain? The person promoted would be deprived of no right or property which he had previously enjoyed: and even if there were any minds so sanguine as to consider themselves certain of success, it would be but a temporary disappointment of their hopes: and taxes are never paid with so much cheerfulness and alacrity as upon the accession of good fortune. It would certainly soon yield a supply which would communicate both comfort and respectability to the indigent clergy.

A great effect would be produced, if one half, or any considerable proportion, were so applied. I am happy to find that a further provision for the inferior clergy has been lately recommended by some of the leading characters in both houses of parliament. See particularly

nature) consists in the rents and profits of the demesne lands of the crown. These demesne lands, *terrae dominicales regis*, being either the share reserved to the crown at the original distribution of landed property, or such as came to it afterwards by forfeitures or other means, were anciently very large and extensive; comprising divers manors, honors, and lordships; the tenants of which had very peculiar privileges, as will be shewn in the second book of these commentaries, when we speak of the tenure in ancient demesne. At present they are contracted within a very narrow compass, having been almost entirely granted away to private subjects. This has occasioned the parliament frequently to interpose; and, particularly, after king William III. had greatly impoverished the crown, an act passed[p], whereby all future grants or leases from the crown for any longer term than thirty-one years or three lives are declared to be void; except with regard to houses, which may be granted for fifty years. And no reversionary lease can be made, so as to exceed, together with the estate in being, the same term of three lives or thirty-one years: that is, where there is a subsisting lease, of which there are twenty years still to come, the king cannot grant a future interest, to commence after the expiration of the former, for any longer term than eleven years. The [287] tenant must also be made liable to be punished for committing waste; and the usual rent must be reserved, or, where there has usually been no rent, one third of the clear yearly value[q]. The misfortune is, that this act was made too late, after almost every valuable possession of

p 1 Ann. st. 1. c. 7.

q In like manner by the civil law, the inheritance or fundi patrimoniales of the imperial crown could not be alienated, but only let to farm. Cod. l. 11. t. 61.

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the speech of the right honorable Sir William Scott, delivered in the house of commons on April 7th, 1802, upon a bill relative to the non-residence of the clergy.

the crown had been granted away for ever, or else upon very long leases; but may be of some benefit to posterity, when those leases come to expire (6).

VI. HITHER might have been referred the advantages which used to arise to the king from the profits of his military tenures, to which most lands in the kingdom were subject, till the statute 12 Car. II. c. 24. which in great measure abolished them all: the explication of the nature of which tenures must be postponed to the second book of these commentaries. Hither also might have been referred the profitable prerogative of purveyance and pre-emption: which was a right enjoyed by the crown of buying up provisions and other necessaries, by the intervention of the king's purveyors, for the use of his royal household, at an appraised valuation, in preference to all others, and even without consent of the owner: and also of forcibly impressing the carriages and horses of the subject, to do the king's business on the public roads, in the conveyance of timber, baggage, and the like, however inconvenient to the proprietor, upon paying him a settled price. A prerogative which prevailed pretty generally throughout Europe, during the scarcity of gold and silver, and the high valuation of money consequential thereupon. In those early times the king's household (as well as those of inferior lords) were supported by specific renders of corn, and other victuals, from the tenants of the respective demesnes; and there was also a continual market kept at the palace gate to furnish viands for the royal use[r]. And this answered all purposes, in those ages of simplicity, so long as

[r] 4 Inst. 273.

(6) By the 26 Geo. III. c. 87. amended by 30 Geo. III. c. 50. commissioners were appointed to inquire into the state and condition of the woods, forests, and land revenues belonging to the crown, and to sell fee-farm and other unimproveable rents.

the king's court continued in any certain place. But when it removed from one part of the kingdom to another (as was formerly very frequently done) it was found neces-
[288] sary to send purveyors beforehand to get together a sufficient quantity of provisions and other necessaries for the household: and, lest the unusual demand should raise them to an exorbitant price, the powers before mentioned were vested in these purveyors: who, in process of time, very greatly abused their authority, and became a great oppression to the subject, though of little advantage to the crown; ready money in open market (when the royal residence was more permanent, and specie began to be plenty) being found upon experience to be the best proveditor of any. Wherefore by degrees the powers of purveyance have declined, in foreign countries as well as our own: and particularly were abolished in Sweden by Gustavus Adolphus towards the beginning of the last century[s]. And, with us in England, having fallen into disuse during the suspension of monarchy, king Charles at his restoration consented, by the same statute, to resign entirely these branches of his revenue and power: and the parliament, in part of recompense, settled on him, his heirs and successors, for ever, the hereditary exercise of fifteen pence *per* barrel on all beer and ale sold in the kingdom, and a proportionable sum for certain other liquors. So that this hereditary excise, the nature of which shall be farther explained in the subsequent part of this chapter, now forms the sixth branch of his majesty's ordinary revenue.

VII. A SEVENTH branch might also be computed to have arisen from wine licenses; or the rents payable to the crown by such persons as are licensed to sell wine by retail thoughout England, except in a few privileged places. These were first settled on the crown by the statute

[s] Mod. Un. Hist. xxxiii. 220.

12 Car. II. c. 25. and, together with the hereditary excise, made up the equivalent in value for the loss sustained by the prerogative in the abolition of the military tenures, and the right of pre-emption and purveyance: but this revenue was abolished by the statute 30 Geo. II. c. 19. and an annual sum of upwards of 7000*l. per annum*, issuing out of the new stamp duties imposed on wine licenses, was settled on the crown in its stead.

VIII. An eighth branch of the king's ordinary [289] revenue is usually reckoned to consist in the profits arising from his forests. Forests are waste grounds belonging to the king, replenished with all manner of beasts of chase or venery; which are under the king's protection, for the sake of his royal recreation and delight: and, to that end, and for preservation of the king's game, there are particular laws, privileges, courts and offices belonging to the king's forests; all which will be, in their turns, explained in the subsequent books of these commentaries. What we are now to consider are only the profits arising to the king from hence, which consist principally in amercements or fines levied for offences against the forest-laws. But as few, if any, courts of this kind for levying amercements[s] have been held since 1632, 8 Car. I. (7) and as, from the accounts given of the proceedings in that court by our histories and law-books[t], nobody would now wish to see them again revived, it is needless (at least in this place) to pursue this inquiry any farther.

s Roger North, in his life of Lord keeper North, (43, 44.) mentions an eyre, or *iter*, to have been held south of Trent soon after the restoration; but I have met with no report of its proceedings.

t 1 Jones. 207—308.

(7) This was one of the odious methods adopted by Car. I. to raise a revenue without the aid of parliament.

IX. The profits arising from the king's ordinary courts of justice make a ninth branch of his revenue. And these consist not only in fines imposed upon offenders, forfeitures of recognizances, and amercements levied upon defaulters; but also in certain fees due to the crown in a variety of legal matters, as, for setting the great seal to charters, original writs, and other forensic proceedings, and for permitting fines to be levied of lands in order to bar entails, or otherwise to insure their title. As none of these can be done without the immediate intervention of the king, by himself or his officers, the law allows him certain perquisites and profits, as a recompense for the trouble he undertakes for the public. These, in process of time, have been almost all granted out to private persons, or else appropriated to certain particular uses: so that, though our law-proceedings are still loaded with [290] their payment, very little of them is now returned into the king's exchequer; for a part of whose royal maintenance they were originally intended. All future grants of them, however, by the statute 1 Ann. st. 1. c. 7. are to endure for no longer time than the prince's life who grants them.

X. A tenth branch of the king's ordinary revenue, said to be grounded on the consideration of his guarding and protecting the seas from pirates and robbers, is the right to *royal fish*, which are whale and sturgeon: and these, when either thrown ashore, or caught near the coast, are the property of the king, on account[t] of their superior excellence. Indeed our ancestors seem to have entertained a very high notion of the importance of this right; it being the prerogatives of the kings of Denmark and the dukes of Normandy[u]; and from one of these it was probably derived to our princes. It is expressly claimed and allowed in the statute *de praerogativa regis*[w]: and the most ancient treatises of law now extant make

t Plowd. 315.
u Stiernh. de jure Sueonum. l. 2. c. 8. Gr. Coustum. cap. 17.
w 17 Edw. II. c. 11.

mention of it[x]; though they seem to have made a distinction between whale and sturgeon, as was incidentally observed in a former chapter[y].

XI. Another maritime revenue, and founded partly upon the same reason (8), is that of shipwrecks: which are also declared to be the king's property by the same prerogative statute 17 Edw. II. c. 11. and were so, long before, at the common law. It is worthy observation, how greatly the law of wrecks has been altered, and the rigor of it gradually softened in favor of the distressed proprietors. Wreck, by the ancient common law, was where any ship was lost at sea, and the goods or cargo were thrown upon the land; in which case these goods, so wrecked, were adjudged to belong to the king: for it was held, that, by the loss of the ship, all property was gone out of the original owner[z]. But this was undoubtedly adding sorrow to sorrow, and was consonant neither to reason nor humanity. Wherefore [291] it was first ordained by king Henry I. that if any person escaped alive out of the ship it should be no wreck[a]; and afterwards king Henry II, by his charter[b], declared, that if on the coasts of either England, Poictou, Oleron, or Gascony, any ship should be distressed, and either man or beast

x Bracton. l. 3. c. 3. Britton. c. 17. Fleta. l. 1. c. 45 and 46. Memorand. Scacch'. H. 24 Edw. I, 37. prefixed to Maynard's year book of Edward II.

y Ch. 4. page 223.

z Dr. and St. d. 2. c. 51.

a Spelm. Cod. apud Wilkins. 305.

b 26 May, A. D. 1174. 1 Rym. Foed. 36.

(8) I should rather presume that this prerogative was founded upon general principles of policy and convenience; for if every person was permitted to carry home what he found upon the sea coast, the true owner would stand a very poor chance of recovering back his property: therefore, for the benefit of the owner, the law places it in the custody of the sheriff or a public officer of the crown, where it will be preserved safely and honestly, and to whom the owner is directed to make inquiries for the property he has lost. And at a time when a rightful claimant is despaired of, it is very properly applied to the augmentation of the public revenue.

should escape or be found therein alive, the goods should remain to the owners, if they claimed them within three months; but otherwise should be esteemed a wreck, and should belong to the king, or other lord of the franchise. This was again confirmed with improvements by king Richard the first; who, in the second year of his reign[c], not only established these concessions, by ordaining that the owner, if he was shipwrecked and escaped, "*omnes res suas* "*liberas et quietas haberet*," but also, that, if he perished, his children, or in default of them his brethren and sisters, should retain the property; and, in default of brother or sister, then the goods should remain to the king[d]. And the law, as laid down by Bracton in the reign of Henry III, seems still to have improved in its equity. For then, if not only a dog (for instance) escaped, by which the owner might be discovered, but if any certain mark were set on the goods, by which they might be known again, it was held to be no wreck[e]. And this is certainly most agreeable to reason; the rational claim of the king being only founded upon this, that the true owner cannot be ascertained. Afterwards, in the statute of Westminster the first[f], the time of limitation of claims, given by the charter of Henry II, is extended to a year and a day, according to the usage of Normandy[g]: and it enacts, that if a man, a dog, or a cat, escape alive, the vessel shall not be adjudged a wreck. These animals, as in Bracton, are only put for examples[h]; for it is now held[i], that not only if any live thing escape, but if proof can be made of the property of any of the goods or lading which come to shore, they shall not be forfeited as wreck. The statute further ordains, that the sheriff of the county shall be bound to keep the goods a year

[292]

c Rog. Hoved. in Ric. I.

d In like manner Constantine the great, finding that by the imperial law the revenue of wrecks was given to the prince's treasury or *fiscus*, restrained it by an edict (Cod. 11. 5. 1.) and ordered them to remain to the owners, adding this humane expostulation, "Quod "enim jus habet fiscus in aliena calamitate, "ut de re tam luctuosa compendium sectetur?"

e Bract. l. 3. c. 3.

f 3 Edw. I. c. 4.

g Gr. Coustum. c. 17.

h Flet. l. 1. c. 44. 2 Inst. 167. 5 Rep. 107.

i Hamilton v. Davies. Trin. 11 Geo. III. B. R.

and a day, (as in France for one year, agreeably to the maritime laws of Oleron[j], and in Holland for a year and a half,) that if any man can prove a property in them, either in his own right or by right of representation[k], they shall be restored to him without delay; but, if no such property be proved within that time, they then shall be the king's. If the goods are of a perishable nature, the sheriff may sell them, and the money shall be liable in their stead[l]. This revenue of wrecks is frequently granted out to lords of manors, as a royal franchise; and if any one be thus entitled to wrecks in his own land, and the king's goods are wrecked thereon, the king may claim them at any time, even after the year and day[m].

It is to be observed, that, in order to constitute a legal *wreck*, the goods must come to land. If they continue at sea, the law distinguishes them by the barbarous and uncouth appellations of *jetsam*, *flotsam*, and *ligan*. Jetsam is where goods are cast into the sea, and there sink and remain under water: flotsam is where they continue swimming on the surface of the waves: ligan is where they are sunk in the sea, but tied to a cork or buoy, in order to be found again[n]. These are also the king's, if no owner appears to claim them; but if any owner appears, he is entitled to recover the possession. For even if they be cast overboard, without any mark or buoy, in order to lighten the ship, the owner is not by this act of necessity construed to have renounced his property[o]: much less can things ligan be supposed to be abandoned, since the owner has done all in his power to assert and retain his property. These three are therefore accounted so far a distinct thing from the former, that by the king's grant to a man of wrecks, things jetsam, flotsam, and ligan will not pass[p].

j Sec. 28.
k 2 Inst. 168.
l Plowd. 166.
m 2 Inst. 168. Bro. Abr. tit. Wreck.
n 5 Rep. 106.
o Quae enim res in tempestate, levandae navis causa, ejiciuntur, hae dominorum permanent. Quia palam est, eas non eo animo ejici, quod quis habere nolit. Inst. 2. 1. sec. 48.
p 5 Rep. 108.

WRECKS, in their legal acceptation, are at present not very frequent: for, if any goods come to land, it rarely happens, since the improvement of commerce, navigation, and correspondence, that the owner is not able to assert his property within the year and day limited by law. And in order to preserve this property entire for him, and if possible to prevent wrecks at all, our laws have made many very humane regulations; in a spirit quite opposite to those savage laws, which formerly prevailed in all the northern regions of Europe, and a few years ago were still said to subsist on the coasts of the Baltic sea, permitting the inhabitants to seise on whatever they could get as lawful prize: or, as an author of their own expresses it, "*in naufragorum miseria et calamitate tanquam vultures ad praedam currere*[q]." For by the statute 27 Edw. III. c. 13. if any ship be lost on the shore, and the goods come to land, (which cannot, says the statute, be called wreck,) they shall be presently delivered to the merchants, paying only a reasonable reward to those that saved and preserved them, which is entitled *salvage*. Also by the common law, if any persons (other than the sheriff) take any goods so cast on shore, which are not legal wreck, the owners might have a commission to inquire and find them out, and compel them to make restitution[r]. And by statute 12 Ann. st. 2. c. 18. confirmed by 4 Geo. I. c. 12. in order to assist the distressed, and prevent the scandalous illegal practices on some of our sea coasts, (too similar to those on the Baltic,) it is enacted, that all head-officers and others of towns near the sea shall, upon application made to them, summon as many hands as are necessary, and send them to the relief of any ship in distress, on forfeiture of 100*l.* and, in case of assistance given, salvage shall be paid by the owners, to be assessed by three neighbouring justices. All persons that secrete any goods shall forfeit their treble value:
[294] and if they wilfully do any act whereby the ship is lost or destroyed, by making holes in her, stealing her pumps, or otherwise, they are guilty of felony, without

q Stiernh. de jure Sueon. l. 3. c. 5. r F. N. B. 119.

benefit of clergy. Lastly, by the statute 26 Geo. II. c. 19. plundering any vessel either in distress, or wrecked, and whether any living creature be on board, or not, (for, whether wreck or otherwise, it is clearly not the property of the populace,) such plundering, I say, or preventing the escape of any person that endeavours to save his life, or wounding him with intent to destroy him, or putting out false lights in order to bring any vessel into danger, are all declared to be capital felonies; in like manner as the destroying of trees, steeples, or other stated sea-marks, is punished by the statute 8 Eliz. c. 13. with a forfeiture of 100*l.* or outlawry. Moreover, by the statute of George II, pilfering any goods cast ashore is declared to be petty larceny; and many other salutary regulations are made for the more effectually preserving ships of any nation in distress[s].

XII. A TWELFTH branch of the royal revenue, the right to mines, has its original from the king's prerogative of coinage, in order to supply him with materials: and therefore those mines, which are properly royal, and to which the king is entitled when found, are only those of silver and gold[t]. By the old common law, if gold or silver be found in mines of base metal, according to the opinion of some the whole was a royal mine, and belonged to the king; though others held that it only did so, if the quantity of gold or silver was of greater value than the quantity of base metal[u]. But now by the statutes 1 W. & M. st. 1. c. 30. and 5 W. & M. c. 6. this difference is made immaterial; it being enacted, that no mines of copper, tin, iron, or lead, shall be looked upon as royal mines, notwithstanding gold or silver may be extracted from them in any quantities: but that the king, or persons

s By the civil law, to destroy persons shipwrecked, or prevent their saving the ship, is capital. And to steal even a plank from a vessel in distress, or wrecked, makes the party liable to answer for the whole ship and cargo. (*Ff.* 47. 9. 3.) The laws also of the Wisigoths, and the most early Neapolitan constitutions, punished with the utmost severity all those who neglected to assist any ship in distress, or plundered any goods cast on shore. (Lindenbrog. Cod. LL. antiq. 146. 715.)

t 2 Inst. 577.

u Plowd. 336.

claiming royal mines under his authority, may have the ore, (other than tin ore in the counties of Devon and Cornwall,) paying for the same a price stated in the act. This was an extremely reasonable law: for now private owners are not discouraged from working mines, through a fear that they may be claimed as royal ones; neither does the king depart from the just rights of his revenue, since he may have all the precious metal contained in the ore, paying no more for it than the value of the base metal which it is supposed to be; to which base metal the land owner is by reason and law entitled.

XIII. To the same original may in part be referred the revenue of treasure-trove, (derived from the French word, *trover*, to find,) called in Latin *thesaurus inventus*, which is where any money or coin, gold, silver, plate, or bullion, is found hidden *in* the earth, or other private place, the owner thereof being unknown; in which case the treasure belongs to the king: but if he that hid it be known, or afterwards found out, the owner and not the king is entitled to it[u]. Also if it be found in the sea, or *upon* the earth, it doth not belong to the king, but the finder, if no owner appears[w]. So that it seems it is the *hiding*, and not the *abandoning* of it, that gives the king a property: Bracton[x] defining it, in the words of the civilians, to be "*vetus depositio pecuniae.*" This difference clearly arises from the different intentions, which the law implies in the owner. A man, that hides his treasure in a secret place, evidently does not mean to relinquish his property; but reserves a right of claiming it again, when he sees occasion: and, if he dies and the secret also dies with him, the law gives it the king, in part of his royal revenue. But a man that scatters his treasure into the sea, or upon the public surface of the earth, is construed to have absolutely abandoned his property, and returned it into the common stock, without any intention of reclaiming it: and therefore it belongs, as in a state of nature, to the first occupant, or

u 3 Inst. 132. Dalt. of Sheriffs. c. 16. w Britt. c. 17. Finch. L. 177. x l. 3. c. 3. sec. 4.

finder (9); unless the owner appear and assert his right, which then proves that the loss was by accident, and not with an intent to renounce his property.

FORMERLY all treasure-trove belonged to the finder[y]; as was also the rule of the civil law[z]. Afterwards it was judged expedient for the purposes of the state, and particularly for the coinage, to allow part of what was so found to the king; which part was assigned to be all *hidden* treasure; such as is *casually lost* and unclaimed, and also such as is *designedly abandoned*, still remaining the right of the fortunate finder. And that the prince shall be entitled to this hidden treasure is now grown to be, according to Grotius[a], "*jus commune*, "*et quasi gentium*:" for it is not only observed, he adds, in England, but in Germany, France, Spain, and Denmark. The finding of deposited treasure was much more frequent, and the treasures themselves more considerable, in the infancy of our constitution, than at present. When the Romans, and other inhabitants of the respective countries which composed their empire, were driven out by the northern nations, they concealed their money under-ground: with a view of resorting to it again when the heat of the irruption should be over, and the invaders driven back to their deserts. But, as this never happened, the treasures were never claimed; and on the death of the owners the secret also died along with them. The conquering generals, being aware of the value of these hidden mines, made it highly penal to secrete them from the public service. In England therefore, as among the feudists[b], the punishment of such as concealed from the king the finding of hidden treasure was formerly no less than death; but now it is only fine and imprisonment[c].

y Bracton. l. 3. c. 3. 3 Inst. 133.
z Ff. 41. 1. 31.
a de jur. b. et p. l. 2. c. 8. sec. 7.
b Glanv. l. 1. c. 2. Crag. l. 16. 40.
c 3 Inst. 133.

(9) This certainly is true, though it cannot be reconciled with the learned judge's doctrine, that all *bona vacantia* belong to the king. See p. 299.

XIV. WAIFS, *bona waviata*, are goods stolen, and waived or thrown away by the thief in his flight, for fear of being apprehended. These are given to the king by the law, as a punishment upon the owner, for not himself pursuing the felon, and taking away his goods from him[d]. And [297] therefore if the party robbed do his diligence immediately to follow and apprehend the thief, (which is called making fresh *suit*,) or do convict him afterwards, or procure evidence to convict him, he shall have his goods again[e]. Waived goods do also not belong to the king, till seised by somebody for his use; for if the party robbed can seise them first, though at the distance of twenty years, the king shall never have them[f]. If the goods are hid by the thief, or left any where by him, so that he had them not about him, when he fled, and therefore did not throw them away in his flight; these also are not *bona waviata*, but the owner may have them again when he pleases[g]. The goods of a foreign merchant, though stolen and thrown away in flight, shall never be waifs[h]; the reason whereof may be, not only for the encouragement of trade, but also because there is no wilful default in the foreign merchant's not pursuing the thief; he being generally a stranger to our laws, our usages, and our language.

XV. ESTRAYS are such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner of them, in which case the law gives them to the king as the general owner and lord paramount of the soil, in recompense for the damage which they may have done therein (10):

d Cro. Eliz. 694.
e Finch. L. 212.
f Ibid.
g 5 Rep. 109.
h Fitz. Abr. tit. Estray. 1. 3 Bulstr. 19.

(10) This reason is not very satisfactory; for the king being the *ultimus hæres* of all the land in the kingdom, they must do the same injury to his interest, whether they are grazing in one place or another out of the king's domains. But the law is probably founded upon general policy; for by giving the estray to the king, or his grantee, and not to the finder, the owner has the best chance of having his

and they now most commonly belong to the lord of the manor, by special grant from the crown. But, in order to vest an absolute property in the king, or his grantees, they must be proclaimed in the church and two market towns next adjoining to the place where they are found: and then, if no man claims them, after proclamation and a year and a day passed, they belong to the king or his substitute without redemption[i]; even though the owner were a minor, or under any other legal incapacity[k]. A provision similar to which obtained in the old Gothic constitution, with regard to all things that were found, which were to be thrice proclaimed; *primum coram comitibus et viatoribus obviis, deinde in proxima villa vel pago,* [298] *postremo coram ecclesia vel judicio:* and the space of a year was allowed for the owner to reclaim his property[l]. If the owner claims them within the year and day, he must pay the charges of finding, keeping, and proclaiming them[m] (11). The king or lord has no property till the year and day passed: for if a lord keepeth an estray three quarters of a year, and within the year it strayeth again, and another lord getteth it, the first lord cannot take it again[n]. Any beasts may be estrays, that are by nature tame or reclaimable, and in which there is a valuable property, as sheep, oxen, swine, and horses, which we in general call cattle; and so Fleta[o] defines them, *pecus vagans, quod nullus petit, sequitur vel advocat.* For animals upon which the law sets no value, as a dog or cat, and

i Mirr. c. 3. sec. 19.
k 5 Rep. 108. Bro. Abr. tit. Estray. Cro. Eliz. 716.
l Stiernh. de jur. Gothor. l. 3. c. 5.
m Dalt. Sh. 79.
n Finch. L. 177.
o l. 1. c. 43.

property restored to him; and it lessens the temptation to commit thefts, as it prevents a man from pretending that he had found, as an estray, what he had actually stolen; or according to the vulgar phrase, that he had found what was never lost.

(11) But if any other person finds and takes care of another's property, not being entitled to it as an estray, the owner may recover it or its value, without being obliged to pay the expenses of keeping. 2 *Bl. Rep.* 1117. 2 *Hen. Bl.* 254.

animals *ferae naturae*, as a bear or wolf, cannot be considered as estrays. So swans may be estrays, but not any other fowl[p]; whence they are said to be royal fowl. The reason of which distinction seems to be, that, cattle and swans being of a reclaimed nature, the owner's property in them is not lost merely by their temporary escape; and they also, from their intrinsic value, are a sufficient pledge for the expense of the lord of the franchise in keeping them the year and day. For he that takes an estray is bound, so long as he keeps it, to find it in provisions and preserve it from damage[q]; and may not use it by way of labor, but is liable to an action for so doing[r]. Yet he may milk a cow, or the like; for that tends to the preservation, and is for the benefit of the animal[s].

BESIDES the particular reasons before given why the king should have the several revenues of royal fish, shipwrecks, treasure-trove, waifs, and estrays, there is also one general reason which holds for them all; and that is, because they are *bona vacantia*, or goods in which no one else can claim a property. And therefore by the law of nature they belonged to the first occupant or finder; and so continued under [299] the imperial law. But, in settling the modern constitutions of most of the governments in Europe, it was thought proper (to prevent that strife and contention, which the mere title of occupancy is apt to create and continue, and to provide for the support of public authority in a manner the least burthensome to individuals) that these rights should be annexed to the supreme power by the positive laws of the state. And so it came to pass that, as Bracton expresses it[t], *haec quae nullius in bonis sunt, et olim fuerunt inventoris de jure naturali, jam efficiuntur principis de jure gentium* (12).

p 7 Rep. 17. r Cro. Jac. 147. t l. 1. c. 12.
q 1 Roll. Abr. 889. s Ibid. 148. Noy. 119.

(12) This cannot be reconciled with what the learned Judge has advanced in p. 295, viz. that if "any thing be found in the sea, "or upon the earth, it doth not belong to the king but the finder, "if no owner appears." That certainly is the law of England;

XVI. The next branch of the king's ordinary revenue consists in forfeitures of lands and goods for offences; *bona confiscata*, as they are called by the civilians, because they belonged to the *fiscus* or imperial treasury; or, as our lawyers term them, *forisfacta*; that is, such whereof the property is gone away or departed from the owner. The true reason and only substantial ground of any forfeiture for crimes consist in this; that all property is derived from society, being one of those civil rights which are conferred upon individuals, in exchange for that degree of natural freedom, which every man must sacrifice when he enters into social communities. If therefore a member of any national community violates the fundamental contract of his association, by transgressing the municipal law, he forfeits his right to such privileges as he claims by that contract; and the state may very justly resume that portion of property, or any part of it, which the laws have before assigned him. Hence, in every offence of an atrocious kind, the laws of England

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and which, with deference to the learned Judge, is the general rule with regard to all *bona vacantia*, except in the particular instances in which the law has given them to the king. Those instances are exceptions, which prove the rule, for *expressio unius est exclusio alterius*. See the case of Armory v. Delamirie in Strange, 505. where a chimney-sweeper's boy recovered from a goldsmith, who detained from him a diamond which he had found, the value of the finest diamond which would fit the socket from which it was taken. And it was clearly held, that the boy had a right to it against all the world, except the owner, who did not appear. I cannot but think that the learned Judge has misconceived the sentence in Bracton, which is this, *Item de hiis, quæ pro wayvio habentur, eicut de averiis, ubi non apparet dominus, et quæ olim fuerunt inventoris de jure naturali, jam efficiuntur principis de jure gentium.* Here the *quæ olim* refer only to the two antecedents *wayvia* and *averia*, or perhaps to *averia* only; by which construction the sentence is consistent, and the whole correct. But if it had been intended that it should be understood as if *omnia* had preceded *quæ*, it would have been superfluous to have instanced *averia*, and the sentence would certainly have been erroneous.

have exacted a total confiscation of the moveables or personal estate; and in many cases a perpetual, in others only a temporary, loss of the offender's immoveables or landed property; and have vested them both in the king, who is the person supposed to be offended, being the one visible magistrate in whom the majesty of the public resides. The particulars of these forfeitures will be more properly recited when we treat of crimes and misdemesnors. I therefore [300] only mention them here, for the sake of regularity, as a part of the *census regalis*; and shall postpone for the present the farther consideration of all forfeitures, excepting one species only, which arises from the misfortune rather than the crime of the owner, and is called a *deodand*.

By this is meant whatever personal chattel is the immediate occasion of the death of any reasonable creature: which is forfeited to the king, to be applied to pious uses, and distributed in alms by his high almoner[u]; though formerly destined to a more superstitious purpose. It seems to have been originally designed, in the blind days of popery, as an expiation for the souls of such as were snatched away by sudden death; and for that purpose ought properly to have been given to holy church[w]: in the same manner as the apparel of a stranger, who was found dead, was applied to purchase masses for the good of his soul. And this may account for that rule of law, that no deodand is due where an infant under the age of discretion is killed by a fall *from* a cart, or horse, or the like, not being in motion[x]; whereas, if an adult person falls from thence and is killed, the thing is certainly forfeited. For the reason given by sir Matthew Hale seems to be very inadequate, *viz.* because an infant is not able to take care of himself; for why should the owner save his forfeiture, an account of the imbecility of the child, which ought rather to have made him more cautious to prevent any accident of mischief? The true ground of this rule seems rather to have

u 1 Hal. P. C. 419. Fleta. l. 1. c. 25. Staunf. P. C. 20, 21.
w Fitzh. Abr. tit. Enditement. pl. 37. x 3 Inst. 57. 1 Hal. P. C. 422.

been, that the child, by reason of its want of discretion, was presumed incapable of actual sin, and therefore needed no deodand to purchase propitiatory masses: but every adult, who died in auctual sin, stood in need of such atonement, according to the humane superstition of the founders of the English law.

THUS stands the law if a person be killed by a fall from a thing standing still. But if a horse, or ox, or other animal, of his own motion, kill as well an infant as an adult, or if a cart run over him, they shall in either case be forfeited as deodands[y]; which is grounded upon this additonal reason, that such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture. A like punishment is in like cases inflicted by the Mosaical law[z]; "if an ox gore a man "that he die, the ox shall be stoned, and his flesh shall not "be eaten." And, among the Athenians[a], whatever was the cause of a man's death, by falling upon him, was exterminated or cast out of the dominions of the republic (13). Where a thing, not in motion, is the occasion of a man's death, that part only which is the immediate cause is forfeited; as if a man be climbing up the wheel of a cart, and is killed by falling from it, the wheel alone is a deodand[b]: but, wherever the thing is in motion, not only that part which [301]

y Omnia, quae movent ad mortem, sunt Deo danda. Bracton. l. 3. c. 5.

z Exod. xxi. 28.

a Aeschin. cont. Ctesiph. Thus too by our ancient law, a well in which a person was drowned, was ordered to be filled up, under the inspection of the coroner. Flet. l. 1. c. 27. sec. 10. Fitzh. Abr. t. corone. 416.

b 1 Hal. P. C. 422.

(13) This was one of Draco's laws; and perhaps we may think the judgment, that a statute should be thrown into the sea for having fallen upon a man, less absurd, when we reflect that there may be sound policy in teaching the mind to contemplate with horror the privation of human life, and that our familiarity even with an insensible object which has been the occasion of death, may lessen that sentiment. Though there may be wisdom in withdrawing such a thing from public view, yet there can be none in treating it as if it was capable of understanding the ends of punishment.

immediately gives the wound, (as the wheel, which runs over his body,) but all things which move with it, and help to make the wound more dangerous, (as the cart and loading, which increase the pressure of the wheel,) are forfeited[c]: It matters not whether the owner were concerned in the killing or not; for, if a man kills another with my sword, the sword is forfeited[d] as an accursed thing[e]. And therefore, in all indictments for homicide, the instrument of death and the value are presented and found by the grand jury, (as, that the stroke was given by a certain penknife, value sixpence,) that the king or his grantee may clam the deodand: for it is no deodand, unless it be presented as such by a jury of twelve men[f]. No deodands are due for accidents happening upon the high sea, that being out of the jurisdiction of the [302] common law: but if a man falls from a boat or ship in fresh water, and is drowned, it hath been said, that the vessel and cargo are in strictness of law a deodand[g]. But juries have of late very frequently taken upon themselves to mitigate these forfeitures, by finding only some trifling thing, or part of an entire thing, to have been the occasion of the death. And in such cases, although the finding by the jury be hardly warrantable by law, the court of king's bench hath generally refused to interfere on behalf of the lord of the franchise, to assist so unequitable a claim[h] (14).

c 1 Hawk. P. C. c. 26.

d A similar rule obtained among the ancient Goths. Siquis, me nesciente, quocunque meo telo vel instrumento in perniciem suam abutatur; vel ex aedibus meis cadat, vel incidat in puteum meum, quantumvis tectum et munitum, vel in catnactum, et sub molendino meo confringatur, ipse aliqua mulcta plectar; ut in parte infelicitatis meae numeretur, habuisse vel aedificasse aliquod quo homo periret. Stiernhook de jure Goth. l. 3. c. 4.

e Dr. and St. d. 2. c. 51.

f 3 Inst. 57.

g 3 Inst. 58. 1 Hal. P. C. 423. Molloy de jure maritim. 2. 225.

h Foster of homicide. 266.

(14) But would it not be much better that laws should be abolished, the policy of which has long ceased, and at which the understandings of mankind so strongly revolt, that juries are inclined to trifle with their oaths, and judges to encourage ridiculous distinctions, which tend to bring the general administration of justice into contempt?

Deodands, and forfeitures in general, as well as wrecks, treasure-trove, royal fish, mines, waifs, and estrays, may be granted by the king to particular subjects, as a royal franchise: and indeed they are for the most part granted out to the lords of manors, or other liberties: to the perversion of their original design.

XVII. Another branch of the king's ordinary revenue arises from escheats of lands, which happen upon the defect of heirs to succeed to the inheritance; whereupon they in general revert to and vest in the king, who is esteemed, in the eye of the law, the original proprietor of all the lands in the kingdom. But the discussion of this topic more properly belongs to the second book of these commentaries, wherein we shall particularly consider the manner in which lands may be acquired or lost by escheat.

XVIII. I proceed therefore to the eighteenth and last branch of the king's ordinary revenue; which consists in the custody of idiots, from whence we shall be naturally led to consider also the custody of lunatics.

An idiot, or natural fool, is one that hath had no understanding from his nativity; and therefore is by law presumed never likely to attain any. For which reason the custody of him and of his lands was formerly vested in [303] the lord of the fee[h]; (and therefore still, by special custom, in some manors the lord shall have the ordering of idiot and lunatic copyholders[i];) but, by reason of the manifold abuses of this power by subjects, it was at last provided by common consent, that it should be given to the king, as the general conservator of his people; in order to prevent the idiot from wasting his estate, and reducing himself and his heirs to poverty and distress[k]. This fiscal prerogative of the king is declared in parliament by statute 17 Edw. II. c. 9. which directs (in affirmance of the common law[l]) that the king shall have ward of the lands of natural fools, taking the

h Flet. l. 1. c. 11. sec. 10.
i Dyer. 302. Hutt. 17. Noy. 97.
k F. N. B. 233.
l 4 Rep. 126. Memorand' Scace' 20 Edw. I. (prefixed to Maynard's year-book of Edw. II.) fol. 29. 34.

profits without waste or destruction, and shall find them necessaries; and after the death of such idiots he shall render the estate to the heirs: in order to prevent such idiots from aliening their lands, and their heirs from being disinherited (15).

By the old common law there is a writ *de idiota inquirendo*, to inquire whether a man be an idiot or not[m]: which must be tried by a jury of twelve men: and, if they find him *furus idiota*, the profits of his lands and the custody of his person may be granted by the king to some subject, who has interest enough to obtain them[n]. This branch of the revenue hath been long considered as a hardship upon private families: and so long ago as in the 8 Jac. I. it was under the consideration of parliament, to vest this custody in the relations of the party, and to settle an equivalent on the crown in lieu of it; it being then proposed to share the same fate with the slavery of the feodal tenures, which has been since abolished[o]. Yet few instances can be given of the oppressive exertion of it, since it seldom happens that a jury finds a man an idiot *a nativitate*, but only *non compos mentis* from some particular time; which has an operation very different in point of law.

A man is not an idiot[p], if he hath any glimmering of reason, so that he can tell his parents, his age, or the like common

m F. N. B. 232.

n This power, though of late very rarely exerted, is still alluded to in common speech, by that usual expression of *begging* a man for a fool.

o 4 Inst. 203. Com. journ. 1610.

p F. N. B. 233.

(15) The jurisdiction which the chancellor has generally, or perhaps always, exercised over the persons and estates of lunatics and idiots, is not necessarily annexed to the custody of the great seal; for it has been declared by the house of lords, "that the custody of idiots "and lunatics was in the power of the king, who might delegate the "same to such person as he should think fit." And upon every change of the great seal, a special authority under his majesty's royal sign manual is granted to the new chancellor for that purpose. Hence no appeal lies from the chancellor's orders upon this subject to the house of lords, but to the king in council. *Dom. Proc.* 14 Feb. 1726. 3 *P. Wms.* 108.

matters. But a man who is born deaf, dumb, and blind, is looked upon by the law as in the same state with an idiot[q]; he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas.

A LUNATIC, or *non compos mentis*, is one who hath had understanding, but by disease, grief, or other accident hath lost the use of his reason[r]. A lunatic is indeed properly one that hath lucid intervals; sometimes enjoying his senses, and sometimes not, and that frequently depending upon the change of the moon. But under the general name of *non compos mentis* (which sir Edward Coke says is the most legal name[s]) are comprized not only lunatics, but persons under frenzies; or who lose their intellects by disease; those that *grow* deaf, dumb, and blind, not being *born* so; or such, in short, as are judged by the court of chancery incapable of conducting their own affairs. To these also, as well as idiots, the king is guardian, but to a very different purpose. For the law always imagines, that these accidental misfortunes may be removed; and therefore only constitutes the crown a trustee for the unfortunate persons, to protect their property, and to account to them for all profits received, if they recover, or after their decease to their representatives. And therefore it is declared by the statute 17 Edw. II. c. 10. that the king shall provide for the custody and sustentation of lunatics, and preserve their lands and the profits of them for their use, when they come to their right mind; and the king shall take nothing to his own use: and if the parties die in such estate, the residue shall be distributed for their souls by the advice of the ordinary, and of course (by the subsequent amendments of the law of administration) shall now go to their executors or administrators.

ON the first attack of lunacy, or other occasional insanity, while there may be hopes of a speedy restitution of reason,

q Co. Litt. 42. Fleta. l. 6. c. 40.

r Idiota a casu et infirmitate. (Mem. Scacch. 20 Edw. I. in Maynard's year-book of Edw. II. 20.)

s 1 Inst. 246.

it is usual to confine the unhappy objects in private custody under the direction of their nearest friends and relations: and the legislature, to prevent all abuses incident to such private custody, hath thought proper to interpose its authority, by statute 14 Geo. III. c. 49. (continued by 19 Geo. III. c. 15.) (16) for regulating private mad-houses. But, when the disorder is grown permanent, and the circumstances of the party will bear such additional expense, it is proper to apply to the royal authority to warrant a lasting confinement.

[305] THE method of proving a person *non compos* is very similar to that of proving him an idiot. The lord chancellor, to whom, by special authority from the king, the custody of idiots and lunatics is intrusted [t], upon petition or information, grants a commission in nature of the writ *de idiota inquirendo*, to inquire into the party's state of mind; and if he be found *non compos*, he usually commits the care of his person, with a suitable allowance for his maintenance, to some friend who is then called his committee. However, to prevent sinister practices, the next heir is seldom permitted to be this committee of the person; because it is his interest that the party should die. But it hath been said, there lies not the same objection against his next of kin, provided he be not his heir; for it is his interest to preserve the lunatic's life, in order to increase the personal estate by savings, which he or his family may hereafter be entitled to enjoy [u]. The heir is generally made the manager or committee of the estate, it being clearly his interest by good management to

t 3 P. Wms. 108. u 2 P. Wms. 638.

(16) And made perpetual by 26 Geo. III. c. 91. By that statute no person shall confine more than one lunatic in a house kept for the reception of lunatics, without an annual license from the college of physicians or the justices in sessions, under a penalty of 500*l*. And if the keeper of a licensed house receive any person as a lunatic, without a certificate from a physician, surgeon, or apothecary, that he is a fit person to be received as a lunatic, he shall forfeit 100*l*.

keep it in condition: accountable however to the court of chancery, and to the *non compos* himself, if he recovers; or otherwise, to his administrators.

In this care of idiots and lunatics the civil law agrees with ours; by assigning them tutors to protect their persons, and curators to manage their estates. But in another instance the Roman law goes much beyond the English. For, if a man by notorious prodigality was in danger of wasting his estate, he was looked upon as *non compos*, and committed to the care of curators or tutors by the praetor[u]. And by the laws of Solon such prodigals were branded with perpetual infamy[w]. But with us, when a man on an inquest [306] of idiocy hath been returned an *unthrift* and not an *idiot*[x], no farther proceedings have been had. And the propriety of the practice itself seems to be very questionable. It was doubtless an excellent method of benefiting the individual, and of preserving estates in families; but it hardly seems calculated for the genius of a free nation, who claim and exercise the liberty of using their own property as they please. "*Sic utere tuo, ut alienum non laedas*," is the only restriction our laws have given with regard to œconomical prudence. And the frequent circulation and transfer of lands and other property, which cannot be effected without extravagance somewhere, are perhaps not a little conducive towards keeping our mixed constitution in its due health and vigor.

This may suffice for a short view of the king's *ordinary* revenue, or the proper patrimony of the crown; which was very large formerly, and capable of being increased to a magnitude truly formidable: for there are very few estates in the kingdom, that have not, at some period or other since the Norman conquest, been vested in the hands of the king by forfeiture, escheat, or otherwise. But, fortunately for the

u Solent praetores, si talem hominem invenerint, qui neque tempus neque finem expensarum habet, sed bona sua dilacerando et dissipando profundit, curatorem ei dare, exemplo furiosi: et tamdiu erunt ambo in curatione, quamdiu vel furiosus sanitatem, vel ille bonos mores, receperit. Ff. 27. 10. 1.

w Potter Antiq. b. 1. c. 26.

x Bro. Abr. tit. Idiot, 4.

liberty of the subject, this hereditary landed revenue, by a series of improvident management, is sunk almost to nothing; and the casual profits, arising from the other branches of the *census regalis*, are likewise almost all of them alienated from the crown. In order to supply the deficiencies of which, we are now obliged to have recourse to new methods of raising money, unknown to our early ancestors; which methods constitute the king's *extraordinary* revenue. For, the public patrimony being got into the hands of private subjects, it is but reasonable that private contributions should supply the public service. Which, though it may perhaps fall harder upon some individuals, whose ancestors have had no share in the general plunder, than upon others, yet, taking the nation throughout, it amounts to nearly the same; provided the gain by the extraordinary, should appear to be no greater than the loss by the ordinary, revenue. And, perhaps, if every [307] gentleman in the kingdom was to be stripped of such of his lands as were formerly the property of the crown; was to be again subject to the inconveniences of purveyance and pre-emption, the oppression of forest laws, and the slavery of feodal tenures; and was to resign into the king's hands all his royal franchises of waifs, wrecks, estrays, treasure-trove, mines, deodands, forfeitures, and the like; he would find himself a greater loser, than by paying his *quota* to such taxes, as are necessary to the support of government. The thing therefore to be wished and aimed at in a land of liberty is by no means the total abolition of taxes, which would draw after it very pernicious consequences, and the very supposition of which is the height of political absurdity. For as the true idea of government and magistracy will be found to consist in this, that some few men are deputed by many others to preside over public affairs, so that individuals may the better be enabled to attend their private concerns; it is necessary that those individuals should be bound to contribute a portion of their private gains, in order to support that government, and reward that magistracy, which protects them in the enjoyment of their respective properties. But

the things to be aimed at are wisdom and moderation, not only in granting, but also in the method of raising the necessary supplies; by contriving to do both in such a manner as may be most conducive to the national welfare, and at the same time most consistent with œconomy and the liberty of the subject; who, when properly taxed, contributes only, as was before observed[y], some part of his property, in order to enjoy the rest.

THESE extraordinary grants are usually called by the synonymous names of aids, subsidies, and supplies; and are granted, we have formerly seen[z], by the commons of Great Britain in parliament assembled: who, when they have voted a supply to his majesty, and settled the *quantum* of that supply, usually resolve themselves into what is called a committee of ways and means, to consider the ways and means of raising the supply so voted. And in this committee every member (though it is looked upon as [308] the peculiar province of the chancellor of the exchequer) may propose such scheme of taxation as he thinks will be least detrimental to the public. The resolutions of this committee, when approved by a vote of the house, are in general esteemed to be (as it were) final and conclusive. For, though the supply cannot be actually raised upon the subject till directed by an act of the whole parliament, yet no monied man will scruple to advance to the government any quantity of ready cash, on the credit of a bare vote of the house of commons, though no law be yet passed to establish it.

THE taxes, which are raised upon the subject, are either annual or perpetual. The usual annual taxes are those upon land and malt.

I. THE land tax, in its modern shape, has superseded all the former methods of rating either property, or persons in respect of their property, whether by tenths or fifteenths, subsidies on land, hidages, scutages, or tallages; a short explication of which will however greatly assist us in understanding our ancient laws and history.

y page 282. z page 169.

TENTHS, and fifteenths[a], where temporary aids issuing out of personal property, and granted to the king by parliament. They were formerly the real tenth or fifteenth part of all the moveables belonging to the subject; when such moveables, or personal estates, were a very different and a much less considerable thing than what they usually are at this day. Tenths are said to have been first granted under Henry the second, who took advantage of the fashionable zeal for croisades to introduce this new taxation, in order to defray the expense of a pious expedition to Palestine, which he really or seemingly had projected against Saladine emperor of the Saracens; whence it was originally denominated the Saladine tenth[b]. But aftewards fifteenths were more usually granted than tenths. Originally the amount of these taxes [309] was uncertain, being levied by assessments new made at every fresh grant of the commons, a commission for which is preserved by Matthew Paris[c]: but it was at length reduced to a certainty in the eighth year of Edward III, when, by virtue of the king's commission, new taxations were made of every township, borough, and city in the kingdom, and recorded in the exchequer; which rate was, at the time, the fifteenth part of the value of every township, the whole amounting to about 29,000*l.* and therefore it still kept up the name of a fifteenth, when, by the alteration of the value of money and the increase of personal property, things came to be in a very different situation. So that when, of later years, the commons granted the king a fifteenth, every parish in England immediately knew their proportion of it; that is, the same identical sum that was assessed by the same aid in the eighth of Edward III; and then raised it by a rate among themselves, and returned it into the royal exchequer.

THE other ancient levies were in the nature of a modern land tax: for we may trace up the original of that charge as high as to the introduction of our military tenures[d]; when

a 2 Inst. 77. 4 Inst. 34.
b Hoved. A. D. 1188. Carte. 1. 719. Hume. 1. 329.
c A. D. 1232.
d See the second book of these commentaries.

every tenant of a knight's fee was bound, if called upon, to attend the king in his army for forty days in every year. But this personal attendance growing troublesome in many respects, the tenants found means of compounding for it, by first sending others in their stead, and in process of time by making a pecuniary satisfaction to the crown in lieu of it. This pecuniary satisfaction at last came to be levied by assessments, at so much for every knight's fee, under the name of scutages; which appear to have been levied for the first time in the fifth year of Henry the second, on account of his expedition to Toulouse, and were then (I apprehend) mere arbitrary compositions, as the king and the subject could agree. But this precedent being afterwards [310] abused into a means of oppression, (in levying scutages on the landholders by the royal authority only, whenever our kings went to war, in order to hire mercenary troops and pay their contingent expenses,) it became thereupon a matter of national complaint; and king John was obliged to promise in his *magna carta* [e], that no scutage should be imposed without the consent of the common council of the realm. This clause was indeed omitted in the charters of Henry III, where [f] we only find it stipulated, that scutages should be taken as they were used to be in the time of king Henry the second. Yet afterwards, by a variety of statutes under Edward I, and his grandson [g], it was provided, that the king shall not take any aids or tasks, any tallage or tax, but by the common assent of the great men and commons in parliament.

Of the same nature with scutages upon knights-fees were the assessments of hidage upon all other lands, and of tallage upon cities and burghs [h]. But they all gradually fell into disuse upon the introduction of subsidies, about the time of king Richard II. and king Henry IV. These were a tax, not immediately imposed upon property, but upon persons in respect of their reputed estates, after the nominal rate of 4*s*.

e cap. 14.
f 9 Hen. III, c. 37.
g 25 Edw. I. c. 5 and 6. 34 Edw. I. st. 4. c. 1. 14 Edw. III. st. 2. c. 1.
h Madox. hist. exch. 490.

in the pound for lands, and 2*s*. 8*d*. for goods; and for those of aliens in a double proportion. But this assessment was also made according to an ancient valuation; wherein the computation was so very moderate, and the rental of the kingdom was supposed to be so exceeding low, that one subsidy of this sort did not, according to sir Edward Coke[i], amount to more than 70,000*l*. whereas a modern land tax at the same rate produces two millions. It was anciently the rule never to grant more than one subsidy and two fifteenths at a time: but this rule was broken through for the first time on a very pressing occasion, the Spanish invasion in 1588; when the parliament gave queen Elizabeth two subsidies and four-fifteenths. Afterwards, as money sunk in value, more subsidies were given; and we have an instance in the first parliament of 1640, of the king's desiring twelve subsidies of the commons, to be levied in three [311] years; which was looked upon as a startling proposal: though lord Clarendon says[k], that the speaker, serjeant Glanville, made it manifest to the house, how very inconsiderable a sum twelve subsidies amounted to, by telling them he had computed what he was to pay for them himself; and when he named the sum, he being known to be possessed of a great estate, it seemed not worth any farther deliberation. And indeed, upon calculation, we shall find, that the total amount of these twelve subsidies, to be raised in three years, is less than what is now raised in one year, by a land tax of two shillings in the pound.

THE grant of scutages, tallages, or subsidies by the commons did not extend to spiritual preferments; those being usually taxed at the same time by the clergy themselves in convocation: which grants of the clergy were confirmed in parliament, otherwise they were illegal, and not binding: as the same noble writer observes of the subsidies granted by the convocation, which continued sitting after the dissolution of the first parliament in 1640. A subsidy granted by the clergy was after the rate of 4*s*. in the pound according

[i] 4 Inst. 33. [k] Hist. b. 2. [l] 4 Inst. 33.

to the valuation of their livings in the king's books; and amounted, as sir Edward Coke tells us[l], to about 20,000*l.* While this custom continued, convocations were wont to sit as frequently as parliaments: but the last subsidies, thus given by the clergy, were those confirmed by statute 15 Car. II. cap. 10. since which another method of taxation has generally prevailed, which takes in the clergy as well as the laity: in recompense for which the beneficed clergy have from that period been allowed to vote at the election of knights of the shire[m]; and thenceforward also the practice of giving ecclesiastical subsidies hath fallen into total disuse.

THE lay subsidy was usually raised by commissioners appointed by the crown, or the great officers of state: and therefore in the beginning of the civil wars between Charles I. and his parliament, the latter having no [312] other sufficient revenue to support themselves and their measures, introduced the practice of laying weekly and monthly assessments[n] of a specific sum upon the several counties of the kingdom; to be levied by a pound rate on lands and personal estates; which were occasionally continued during the whole usurpation, sometimes at the rate of 120,000*l.* a month, sometimes at inferior rates[o]. After the restoration the ancient method of granting subsidies, instead of such monthly assessments, was twice, and twice only, renewed; *viz.* in 1663, when four subsidies were granted by the temporalty, and four by the clergy; and in 1670, when 800,000*l.* was raised by way of subsidy, which was the last

l 4 Inst. 33.

m Dalt. of sheriffs, 418. Gilb. hist. of exch. c. 4.

n 29 Nov. 4 Mar. 1642.

o One of these bills of assessment, in 1656, is preserved in Scobell's collection, 400. (17).

(17) Sir John Sinclair has given the proportions to be levied upon each county of an assessment of 70,000*l.* a month in the year 1660, in his History of the Public revenue, 1 part, 189.

time of raising supplies in that manner (18). For, the monthly assessments being now established by custom, being raised by commissioners named by parliament, and producing a more certain revenue; from that time forwards we hear no more of subsidies, but occasional assessments were granted as the national emergencies required. These periodical assessments, the subsidies which preceded

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(18) No subsidies were granted either by the laity or clergy after 1663, 15 Car. II. c. 9 & 10. The learned Judge has been misled by the title to the act of the 22 and 23 Car. II. c. 3. in the year 1670, when he declares it was the last time of raising supplies by way of subsidy; for the title of it is, "An act to grant a subsidy to his majesty for supply of his extraordinary occasions." But although, among a great variety of other taxes, 1*s.* in the pound is to be raised upon land, yet the mode of collecting it is totally different from the former subsidy assessment: it is to be levied by exactly the same plan and arrangements which were afterwards adopted in the 4 W. & M. And according to the regulations in the statute 4 W. & M. c. 1. and the valuation of estates made at that time, the parliament every year at present renews the grant of the land tax, and orders it to be collected. All the material clauses of the statute in the 22 & 23 Car. II. are copied *verbatim* in that of the 4 W. & M.; the act of Charles is not printed in the common edition of the Statutes at Large, but it is given at length in Keble's edition. And even then this scheme of taxing landed property was not a novelty, for it was first introduced in the time of the commonwealth. The substance of this plan may be seen in an act for an assessment to raise 60,000*l.* a month in Scobell's acts, 1656, c. 12.

To those who have leisure and opportunity, it might afford entertainment to inquire what was the difference of the assessments returned into the exchequer in the years 1656, 1670, and 1692. For besides the present disproportion in the assessment necessarily arising from a more improved cultivation of land in some counties, it is commonly supposed that there was an original inequality in the valuation of estates, from the liberality or fraud of the owners and assessors in their representations of the value, according to their attachment or aversion to the new government.

them, and the more ancient scutage, hidage, and tallage, were to all intents and purposes a land tax; and the assessments were sometimes expressly called so [p]. Yet a popular opinion has prevailed, that the land tax was first introduced in the reign of king William III; because in the year 1692 a new assessment or valuation of estates was made throughout the kingdom: which, though by no means a perfect one, had this effect, that a supply of 500,000*l.* was equal to 1*s.* in the pound of the value of the estates given in. And, according to this enhanced valuation, from the year 1693 to the present, a period of above fourscore years, the land tax has continued an annual charge upon the subject; above half the time at 4*s.* in the pound, sometimes at 3*s*, sometimes at 2*s*, twice [q] at 1*s*, but without any total intermission. The medium has been 3*s.* 3*d.* in the pound; being equivalent with twenty-three ancient subsidies, and amounting annually to more than a million and a half of money.
The method of raising it is by charging a particular [313] sum upon each county, according to the valuation given in, *A. D.* 1692: and this sum is assessed and raised upon individuals (their personal estates, as well as real, being liable thereto) by commissioners appointed in the act, being the principal landholders of the county, and their officers (19).

[p] Com. journ. 26 Jun. 9 Dec. 1678. [q] In the years 1732 and 1733.

(19) By the statute 38 Geo. III. c. 60. the preamble of which states, "that it may materially conduce to strengthening and supporting the "public credit, and to augmenting the nation's resources at this im- "portant conjuncture, that the duty now payable for one year on land "should be made perpetual, but subject to redemption and purchase, "on transferring to the commissioners for the reduction of the national "debt a certain proportion of capital stock, in manner therein stated;" it is enacted that the land tax shall be raised and paid yearly to his majesty and his heirs for ever, subject to redemption under certain rules and conditions. This act was afterwards amended by several

II. The other annual tax is the malt tax; which is a sum of 750,000*l.* raised every year by parliament, ever since 1697, by a duty of 6*d.* in the bushel on malt, and a proportionable sum on certain liquors, such as cyder and perry, which might otherwise prevent the consumption of malt. This is under the management of the commissioners of the excise; and is indeed itself no other than an annual excise, the nature of which species of taxation I shall presently explain: only premising at present, that in the year 1760 an additional perpetual excise of 3*d.* *per* bushel was laid upon malt; to the produce of which a duty of 15 *per cent.* or nearly an additional halfpenny per bushel, was added in 1779 (20): and that in 1763 a proportionable excise was laid upon cyder and perry, but so new-modelled in 1766, as scarce to be worth collecting (21).

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other acts, all of which were repealed, and the provisions consolidated and amended by the statute 42 Geo. III. c. 116. The consideration for redemption shall (generally speaking) be so much capital stock of the three pounds *per centum* consolidated annuities, or the three pounds *per centum* reduced annuities, as will yield a dividend exceeding the amount of the land tax redeemed by one-tenth part thereof. This stock may be transferred by the purchaser all at once, or by instalments, and in certain cases the redemption may be made by payments in money.

The regulations of the statute are far too numerous to be farther detailed in a note.

(20) And in the next year, a further additional duty of 6*d.* a bushel was laid upon malt. But by the consolidation act, 27 Geo. III. c. 13. these duties are repealed; and, in lieu of them, 9$\frac{1}{4}$*d.* is laid upon every bushel of malt in England, and half as much in Scotland. Sir John Sinclair states, that from Michaelmas 1787 to Michaelmas 1788, the net produce of the perpetual excise upon malt was 724,786*l.*; the annual excise 603,317*l.*; the duties upon beer, 1,666,152*l.*; upon British spirits, 509,167*l.*: so that barley yielded a clear revenue of 3,503,422*l.* 3 *Sinc.* 125.

(21) Though the land tax is supposed, and stated in the annual act, to raise, at 4*s.* in the pound, an income of 1,989,673*l.* 7*s.* 10$\frac{1}{2}$*d.* for Eng-

THE perpetual taxes are,

I. THE customs; or the duties, toll, tribute, or tariff, payable upon merchandise exported and imported. The considerations upon which this revenue (or the more ancient part of it, which arose only from exports) was invested in the king, were said to be two[r]; 1. Because he gave the subject leave to depart the kingdom, and to carry his goods along with him. 2. Because the king was bound of common right to maintain and keep up the ports and havens, and to protect the merchant from pirates. Some have imagined they are called with us customs, because they were the inheritance of the king by immemorial usage and the common law, and not granted him by any statute[s]: but sir Edward Coke hath clearly shewn[t], that the king's first claim to them was by grant of parliament 3 Edw. I. though the [314] record thereof is not now extant (22). And indeed this is in express words confessed by statute 25 Edw. I. c. 7.

r Dyer, 165. s Dyer, 43. pl. 24. t 2 Inst. 58, 59.

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land; and 47,954*l.* 1*s.* 2*d.* for Scotland; making in all, 2,037,627*l.* 9*s.* 0½*d.* yet Sir John Sinclair shews, with great appearance of accuracy, that it is so uniformly deficient, that, upon an average, the whole amount ought not to be estimated at more than 1,900,000*l.* and that the annual malt tax, after two very favorable years, ending at Michaelmas 1788, did not average more than 600,000*l.* 3 Part, 108. 117.

(22) Sir Edward Coke cites a letter patent of Edw. I. in which the king recites, that the parliament had granted to him and his heirs *quædam nova consuetudo* upon wool, skins, and leather: but that merchants paid duties and customs long before, appears from the memorable clause in *magna charta*, upon which sir Edward Coke is there commenting: that clause provides, that all merchants shall have safe conduct throughout England, *ad emendum et vendendum sine omnibus malis tolnetis, per antiquas et rectas consuetudines*: and he says, these are subsidies or customs granted by common consent *pro bono publico*. 2 *Inst.* 58. They seem to have been called customs, from having been

wherein the king promises to take no customs from merchants, without the common assent of the realm, "saving to "us and our heirs, the customs on wool, skins, and leather, "formerly granted to us by the commonalty aforesaid." These were formerly called the hereditary customs of the crown; and were due on the exportation only of the said three commodities, and of none other: which were styled the *staple* commodities of the kingdom, because they were obliged to be brought to those ports where the king's staple was established, in order to be there first rated, and then exported [u]. They were denominated in the barbarous Latin of our ancient records, *custuma* [v]; not *consuetudines*, which is the language of our law whenever it means merely usages. The duties on wool, sheepskins, or woolfells, and leather, exported, were called *custu-*

u Dav. 9.

v This appellation seems to be derived from the French word *coustum*, or *coutum*, which signifies toll or tribute, and owes its own etymology to the word *cout*, which signifies price, charge, or as we have adopted it in English, *cost*.

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paid from time immemorial; and a memorable statute in the 21 Edw. I. c. 5. makes that distinction. It states, that several people are apprehensive that the aids, tasks, and prizes, which they had granted for the king's wars and other occasions, might be turned upon them and their heirs *(en servage)* into an act of slavery; the king therefore declares and grants, that he will not draw such temporary aids and taxes into a *custom*.

This is a striking and noble instance of a jealous spirit of liberty in our ancestors, and that they were anxious to preserve those rights which, by *magna charta*, they had successfully vindicated.

Lord Coke, both in 2 Inst. 58, and in 4 Inst. 29, 30. shews from the authorities he cites, that customs or duties were called in old legal Latin *custuma* and *consuetudines* indiscriminately. But he seems very desirous of inculcating the doctrine, that all customs or duties owe their origin to the authority of parliament; a doctrine, which, both before and after his time, the crown was inclined to controvert.

ma antiqua sive magna: and were payable by every merchant, as well native as stranger; with this difference, that merchant strangers paid an additional toll, *viz.* half as much again as was paid by natives. The *custuma parva et nova* were an impost of 3*d.* in the pound, due from merchant strangers only, for all commodities as well imported as exported; which was usually called the alien's duty, and was first granted in 31 Edw. I[w]. But these ancient hereditary customs, especially those on wool and woolfells, came to be of little account, when the nation became sensible of the advantages of a home manufacture, and prohibited the exportation of wool by statute 11 Edw. III. c. 1.

THERE is also another very ancient hereditary duty belonging to the crown, called the *prisage* or *butlerage* of wines; which is considerably older than the customs, being taken notice of in the great roll of the exchequer, 8 Ric. I. still extant[x]. Prisage was a right of *taking* two [315] tons of wine from every ship (English or foreign) importing into England twenty tons or more; one before, and one behind the mast: which by charter of Edward I. was exchanged into a duty of 2*s.* for every ton imported by merchant-strangers, and called butlerage, because paid to the king's butlery[y].

OTHER customs payable upon exports and imports were distinguished into subsidies, tonnage, poundage, and other imposts. Subsidies were such as were imposed by parliament upon any of the staple commodities before mentioned, over and above the *custuma antiqua et magna:* tonnage was a duty upon all wines imported, over and above the prisage and butlerage aforesaid: poundage was a duty imposed *ad valorem*, at the rate of 12*d.* in the pound, on all other merchandise whatsoever; and the other imposts were such as were occasionally laid on by parliament, as circumstances and times

w 4 Inst. 29.
x Madox. hist. exch. 526. 532.
y Dav. 8. 2. Bulstr. 254. Stat. Estr. 16 Edw. II. Com. journ. 27 Apr. 1689.

required[z]. These distinctions are now in a manner forgotten, except by the officers immediately concerned in this department; their produce being in effect all blended together, under the one denomination of the customs.

By these we understand, at present, a duty or subsidy paid by the merchant, at the quay, upon all imported as well as exported commodities, by authority of parliament; unless where, for particular national reasons, certain rewards, bounties, or drawbacks, are allowed for particular exports or imports. Those of tonnage and poundage, in particular, were at first granted, as the old statutes (and particularly 1 Eliz. c. 19.) express it, for the defence of the realm, and the keeping and safeguard of the seas, and for the intercourse of merchandise safely to come into and pass out of the same. They were at first usually granted only for a stated term of years, as, for two years in 5 Ric. II[a]; but in Henry the sixth's time, they were granted him for life by a statute in the thirty-first year of his reign; and again to Edward IV, for the term of his life also: since which time they were regularly granted to all his successors, for life, sometimes at the first, [316] sometimes at other subsequent parliaments, till the reign of Charles the first; when, as the noble historian expresses it[b], his ministers were not sufficiently solicitous for a renewal of this legal grant. And yet these imposts were imprudently and unconstitutionally levied and taken, without consent of parliament, for fifteen years together; which was one of the causes of those unhappy discontents, justifiable at first in too many instances, but which degenerated at last into causeless rebellion and murder. For, as in every other, so in this particular case, the king (previous to the commencement of hostilities) gave the nation ample satisfaction for the errors of his former conduct, by passing an act[c], whereby he renounced all power in the crown of levying the duty of tonnage and poundage, without the express consent of parliament; and also all power of impo-

z Dav. 11, 12. a Dav. 12. b Hist. Rebell. b. 3. c 16 Car. I. c. 8.

sition upon any merchandises whatever. Upon the restoration this duty was granted to king Charles the second for life, and so it was to his two immediate successors; but now by three several statutes, 9 Ann. c. 6. 1 Geo. I. c. 12. and 3 Geo. I. c. 7. it is made perpetual and mortgaged for the debt of the public. The customs thus imposed by parliament, are chiefly contained in two books of rates, set forth by parliamentary authority [d]; one signed by sir Harbottle Grimston, speaker of the house of commons in Charles the second's time; and the other an additional one signed by sir Spencer Compton, speaker in the reign of George the first; to which also subsequent additions have been made (23). Aliens pay

[d] Stat. 12 Car. II. c. 4. 11 Geo. I. c. 7.

(23) In the year 1787, by the 27 Geo. III. c. 13. called the consolidation act, all the former statutes imposing duties of customs and excise were repealed with regard to the *quantum* of the duty; and the two books of rates mentioned by the learned Judge, were declared to be of no avail for the future; but all the former duties were consolidated, and were ordered to be paid according to a new book of rates annexed to that statute. Before this act was passed, it could not be supposed that many persons, beside excisemen and custom-house officers, could be acquainted with the duties payable upon the different articles of commerce. Sir John Sinclair says, that French wine was liable to fifteen, and French paper to fourteen, different duties, which, of course, lay widely dispersed in so many acts of parliament. But now, by this excellent improvement, we can immediately find the duty upon the importation or exportation of any article; or what excise duty any commodity is subject to, in an alphabetical table. Bullion, wool, and some few other commodities, may be imported duty free. All the articles enumerated in the tables or book of rates pay, upon importation or exportation, the sum therein specified, according to their weight, number, or measure. And all other goods and merchandise, not being particularly enumerated or described, and permitted to be imported and used in Great Britain, shall pay upon importation 27*l.* 10*s.* *per cent. ad valorem*, or for every 100*l.* of the value thereof; but subject to a drawback of 25*l.* *per cent.* upon exportation. Very few commodities pay a duty upon exportation; but where that duty is not specified in the tables, and the exportation is not prohibited, all articles may be exported without pay-

a larger proportion than natural subjects, which is what is now generally understood by the alien's duty; to be exempted from which is one principal cause of the frequent application to parliament for acts of naturalization (24).

THESE customs are then, we see, a tax immediately paid by the merchant, although ultimately by the consumer. And yet these are the duties felt least by the people; and, if pru-

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ment of duty, provided they are regularly entered and shipped; but, on failure thereof, they are subject to a duty of 5*l.* 10*s.* *per cent ad valorem*. And to prevent frauds in the representation of the value, a very simple and equitable regulation is prescribed by the act, *viz.* the proprietor shall himself declare the value, and if this should appear not to be a fair and true estimate, the goods may be seised by the proper officer; and four of the commissioners of the customs may direct that the owner shall be paid the price which he himself fixed upon them, with an advance of ten *per cent.* besides all the duty which he may have paid; and they may then order the goods to be publicly sold, and if they raise any sum beyond what was paid to the owner and the subsequent expenses, one half of the overplus shall be paid to the officer who made the seisure, and the other half to the public revenue. This statute is of infinite consequence to the commercial part of the world; it has reduced an important subject from a perfect chaos to such a plain and simple form, as to induce every friend to his country to wish that similar experiments were made upon other confused and entangled branches of our statute law.

By the 42 Geo. III. c. 43. additional duties are granted upon goods imported and exported, and on the tonnage of ships, according to a book of rates annexed to the statute.

By that statute British goods, not specifically noticed, exported to any place in Europe or within the Streights of Gibraltar, pay 10*s.* *per cent.* exported to any other part of the world, (the East Indies excepted) 1 *per cent. ad valorem*.

(24) By the 24 Geo. III. sess. 2. c. 16. it was enacted, that the petty custom, or additional duty on all the goods of aliens or strangers, should cease, except those which had been granted to the city of London. The city of London still retains a trifling duty called scavage, on the goods of aliens. It is an odious and impolitic tax; and it would be honorable to the city of London to adopt the liberality of the legislature, and to relinquish it.

dently managed, the people hardly consider that they pay them at all. For the merchant is easy, being sensible he does not pay them for himself; and the consumer, who really pays them, confounds them with the price [317] of the commodity: in the same manner as Tacitus observes, that the emperor Nero gained the reputation of abolishing the tax of the sale of slaves, though he only transferred it from the buyer to the seller; so that it was, as he expresses it, "*remissum magis specie, quam vi: quia, cum "venditor pendere juberetur, in partem pretii emptoribus "accrescebat*[e]." But this inconvenience attends it on the other hand, that these imposts, if too heavy, are a check and cramp upon trade; and especially when the value of the commodity bears little or no proportion to the quantity of the duty imposed. This in consequence gives rise also to smuggling, which then becomes a very lucrative employment: and its natural and most reasonable punishment, *viz.* confiscation of the commodity, is in such cases quite ineffectual; the intrinsic value of the goods, which is all that the smuggler has paid, and therefore all that he can lose, being very inconsiderable when compared with his prospect of advantage in evading the duty. Recourse must therefore be had to extraordinary punishments to prevent it; perhaps even to capital ones: which destroys all proportion of punishment[f], and puts murderers upon an equal footing with such as are really guilty of no natural, but merely a positive, offence.

THERE is also another ill consequence attending high imposts on merchandise, not frequently considered, but indisputably certain; that the earlier any tax is laid on a commodity, the heavier it falls upon the consumer in the end: for every trader, through whose hands it passes, must have a profit, not only upon the raw material and his own labor and time in preparing it, but also upon the very tax itself, which he advances to the government; otherwise he loses the use and interest of the money which he so advances. To instance

[e] Hist. l. 13. [f] Montesq. S. L. b. 13. c. 8.

in the article of foreign paper. The merchant pays a duty upon importation, which he does not receive again till he sells the commodity, perhaps at the end of three months. [318] He is therefore equally entitled to a profit upon that duty which he pays at the custom-house, as to a profit upon the original price which he pays to the manufacturer abroad; and considers it accordingly in the price he demands of the stationer. When the stationer sells it again, he requires a profit of the printer or bookseller upon the whole sum advanced by him to the merchant: and the bookseller does not forget to charge the full proportion to the student or ultimate consumer; who therefore does not only pay the original duty, but the profits of these three intermediate traders, who have successively advanced it for him. This might be carried much farther in any mechanical, or more complicated, branch of trade.

II. DIRECTLY opposite in its nature to this is the excise duty; which is an inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption. This is doubtless, impartially speaking, the most œconomical way of taxing the subject: the charges of levying, collecting, and managing the excise duties being considerably less in proportion than in other branches of the revenue (25). It also renders the commodity cheaper to the consumer, than charging it with customs to the same amount would do; for the reason just now given, because generally paid in a much later stage of it. But, at the same time, the rigor and arbitrary proceedings of excise-laws seem hardly compatible with the

(25) In the year 1796, the expense of collecting the customs was $8\frac{1}{2}$ *per cent.* nearly upon the net produce, the duties of excise $5\frac{1}{2}$, stamps $5\frac{1}{4}$, land tax and assessed taxes $3\frac{1}{4}$, salt $7\frac{9}{10}$, and that the everage expense of collecting the whole revenue was less than $6\frac{1}{2}$. See the 4th report of the committee on finance, 1797, p. 6.

In the year ending 5 Jan. 1802, these proportions, are something different, see p. 326. n. 37. in this volume, where the net produce and the rate *per centum* of collecting, are stated at length.

temper of a free nation. For the fraud that might be committed in this branch of the revenue, unless a strict watch is kept, make it necessary, wherever it is established, to give the officers a power of entering and searching the houses of such as deal in exciseable commodities, at any hour of the day, and, in many cases, of the night likewise. And the proceedings in case of transgressions are so summary and sudden, that a man may be convicted in two days time in the penalty of many thousand pounds by two commissioners or justices of the peace; to the total exclusion of the trial by jury, and disregard of the common law (26). For which reason, though lord Clarendon tells us, that to his knowledge the earl of [319] Bedford (who was made lord treasurer by king Charles the first, to oblige his parliament) intended to have set up the excise in England, yet it never made a part in that unfortunate prince's revenue; being first introduced, on the model of the Dutch prototype, by the parliament itself after its rupture with the crown. Yet such was the opinion of its general unpopularity, that when in 1642, "aspersions were cast by "malignant persons upon the house of commons, that they "intended to introduce excises, the house for its vindication "therein did declare, that these rumors were false and scan-"dalous; and that their authors should be apprehended and "brought to condign punishment[h]." However, its original[i]

g Hist. b. 3.

h Com. Journ. 8 Oct. 1642.

i The translator and continuator of Petavius's chronological history (Lond. 1659. fol.) informs us, that it was first moved for, 28 Mar. 1643, by Mr. Prynne. And it appears from the journals of the commons, that on that day the house resolved itself into a

(26) See the jurisdiction of the commissioners and justices of the peace in cases of excise in Burn's Justice, title *Excise*. The grievances of the excise perhaps exist more in apprehension than in reality. Actions and prosecutions against officers, commissioners, and justices, for misconduct in excise cases, are very rarely heard of in courts of law. It is certainly an evil that a fair dealer cannot have the benefit of any secret improvement in the management of his trade or manufactory; yet perhaps it is more than an equivalent to the public at large, that, by the survey of the excise, the commodity is preserved from many shameful adulterations, as experience has fully proved since wine was made subject to the excise laws.

establishment was in 1643, and its progress was gradual; being at first laid upon those persons and commodities, where it was supposed the hardship would be least perceivable, viz. the makers and venders of beer, ale, cyder, and perry[k], and the royalists at Oxford soon followed the example of their brethren at Westminster by imposing a similar duty; both sides protesting that it should be continued no longer than to the end of the war, and then be utterly abolished[l]. But the parliament at Westminster soon after imposed it on flesh, wine, tobacco, sugar, and such a multitude of other commodities, that it might fairly be denominated general: in pursuance of the plan laid down by Mr. Pymme (who seems to have been the father of the excise) in his letter to sir John Hotham[m], signifying, "that they had proceeded in the excise to many "particulars, and intended to go on farther; but that it would "be necessary to use the people to it by little and [320] "little." And afterwards, when the nation had been accustomed to it for a series of years, the succeeding champions of liberty boldly and openly declared, "the impost "of excise to be the most easy and indifferent levy that could "be laid upon the people[n]:" and accordingly continued it during the whole usurpation. Upon king Charles's return, it having then been long established and its produce well known, some part of it was given to the crown, in 12 Car. II. by way of purchase (as was before observed) for the feodal tenures and other oppressive parts of the hereditary revenue. But, from its first original to the present time, its very name has been odious to the people of England. It has nevertheless been imposed on abundance of other commodities in the reigns of king William III, and every succeeding prince, to support the

committee to consider of raising money, in consequence of which the excise was afterwards voted. But Mr. Prynne was not a member of parliament till 7 Nov. 1648; and published in 1654, "A protestation against "the illegal, detestable, and oft condemned tax "and extortion of excise in general." It is probably therefore a mistake of the printer for Mr. Pymme, who was intended for chancellor of the exchequer under the earl of Bedford. Lord Clar. b. 7.

k Com. Journ. 17 May 1643.

l Lord Clar. b. 7.

m 30 May 1643. Dugdale of the troubles, 120.

n Oxf. 14 Aug. 1643. c. 80. Scobell. 73. Sept. 1656. c. 19. Scobell. 453.

enormous expenses occasioned by our wars on the continent. Thus brandies and other spirits are now excised at the distillery; printed silks and linens, at the printer's; starch and hair powder, at the maker's; gold and silver wire, at the wiredrawer's; plate in the hands of the vendor, who pays yearly for a license to sell it; lands and goods sold by auction, for which a pound-rate is payable by the auctioneer, who also is charged with an annual duty for his license; and coaches and other wheel carriages, for which the occupier is excised, though not with the same circumstances of arbitrary strictness, as in most of the other instances. To these we may add coffee and tea, chocolate and cocoa paste, for which the duty is paid by the retailer; all artificial wines, commonly called sweets; paper and pasteboard, first when made, and again if stained or printed; malt as before-mentioned; vinegars; and the manufacture of glass; for all which the duty is paid by the manufacturer; hops, for which the person that gathers them is answerable; candles and soap, which are paid for at the maker's; malt liquors brewed for sale, which are excised at the brewery; cyder and perry, at the vendor's; and leather and skins, at the tanners's. A list which no friend to his country would wish to see farther increased.

III. I PROCEED therefore to a third duty, namely [321] that upon salt; which is another distinct branch of his majesty's extraordinary revenue, and consists in an excise of 3*s*. 4*d*. *per* bushel imposed upon all salt, by several statutes of king William and other subsequent reigns. This is not generally called an excise, because under the management of different commissioners: but the commissioners of the salt duties have by statute 1 Ann. c. 21. the same powers, and must observe the same regulations, as those of other excises. This tax had usually been only temporary; but by statute 26 Geo. II. c. 3. was made perpetual (27).

(27) For particular regulations respecting the duty on salt, see Burn's Just. title, *Excise*, Salt.

IV. Another very considerable branch of the revenue is levied with greater cheerfulness, as, instead of being a burden, it is a manifest advantage to the public. I mean the post-office, or duty for the carriage of letters. As we have traced the original of the excise to the parliament of 1643, so it is but justice to observe that this useful invention owes its first legislative establishment to the same assembly. It is true, there existed post-masters in much earlier times: but I apprehend their business was confined to the furnishing of post-horses to persons who were desirous to travel expeditiously, and to the despatching of extraordinary pacquets upon special occasions. King James I. originally erected a post-office under the control of one Matthew de Quester or de l'Equester for the conveyance of letters to and from foreign parts; which office was afterwards claimed by lord Stanhope [o], but was confirmed and continued to William Frizell and Thomas Witherings by king Charles I, *A. D.* 1632, for the better accommodation of the English merchants [p]. In 1635, the same prince erected a letter-office for England and Scotland, under the direction of the same Thomas Witherings, and settled certain rates of postage [q]: but this extended only to a few of the principal roads, the times of carriage were uncertain, and the post-masters on each road were required
[322] to furnish the mail with horses at the rate of 2½*d.* a mile. Witherings was superseded, for abuses in the execution of both his offices, in 1640; and they were sequestered into the hands of Philip Burlamachy, to be exercised under the care and oversight of the king's principal secretary of state [r]. On the breaking out of the civil war, great confusions and interruptions were necessarily occasioned in the conduct of the letter-office. And, about that time, the outline of the present more extended and regular plan seems to have been conceived by Mr. Edmond Prideaux, who was appointed attorney general to the commonwealth after the murder of king Charles. He was chairman of a

o Latch. Rep. 87.
p 19 Rym. Fœd. 385.
q Ibid. 650. 20 Rym. 192.
r 20. Rym. 429.

committee in 1642 for considering what rates should be set upon inland letters[s]; and afterwards appointed postmaster by an ordinance of both the houses[t], in the execution of which office he first established a *weekly* conveyance of letters into *all* parts of the nation[u]; thereby saving to the public the charge of maintaining postmasters to the amount of 7000*l. per annum*. And, his own emoluments being probably very considerable, the common council of London endeavoured to erect another post-office in opposition to his; till checked by a resolution of the house of commons[w], declaring that the office of postmaster is and ought to be in the sole power and disposal of the parliament. This office was afterwards farmed by one Manley in 1654[x]. But, in 1657, a regular post-office was erected by the authority of the protector and his parliament (28), upon nearly the same model as has been ever since adopted, and with the same rates of postage as continued till the reign of queen Anne[y]. After the restoration a similar office, with some improvements, was established by statute 12 Car. II. c. 35. but the rates of letters were altered, and some farther regulations added, by the statutes 9 Ann. c. 10. 6 Geo. I. c. 21. 26 Geo.

s Com. Journ. 28 Mar. 1642.
t Ibid. 7 Sept. 1644.
u Ibid. 21 Mar. 1649.
w Ibid. 21 Mar. 1649.
x Scobell. 358.
y Com. Journ. 9 June 1657. Scobell. 511.

(28) The preamble of the ordinance states, that the establishing one general post-office, besides the benefit to commerce, and the convenience of conveying public despatches, "will be the best means to discover and prevent many dangerous and wicked designs against the "commonwealth."

The policy of having the correspondence of the kingdom under the inspection of government is still continued; for, by a warrant from one of the principal secretaries of state, letters may be detained and opened; but if any person shall wilfully detain or open a letter delivered to the post-office without such authority, he shall forfeit 20*l.* and be incapable of having any future employment in the post-office. 9 *Ann.* c. 10. *s.* 40. But it has been decided, that no person is subject to this penalty but those who are employed in the post-office. 5 *T. R.* 101.

II. c. 12. 5 Geo. III. c. 25. & 7 Geo. III. c. 50. and penalties were enacted, in order to confine the carriage of letters to the public office only, except in some few cases: a provision which is absolutely necessary; for nothing but
[323] an exclusive right can support an office of this sort: many rival independent offices would only serve to ruin one another. The privilege of letters coming free of postage, to and from members of parliament, was claimed by the house of commons in 1660, when the first legal settlement of the present post-office was made [z]; but afterwards dropped [a] upon a private assurance from the crown that this privilege should be allowed the members [b] (29). And accordingly a warrant was constantly issued to the post-master-general [c], directing the allowance thereof to the extent of two ounces in weight: till at length it was expressly confirmed by statute 4 Geo. III. c. 24.; which adds many new regulations, rendered necessary by the great abuses crept into the practice of franking (30):

z Com. Journ. 17 Dec. 1660.
a Ibid. 22 Dec. 1660.
b Ibid. 16 Apr. 1735.
c Ibid. 26 Feb. 1734.

(29) The following account of it in the 23 vol. Parl. Hist. p. 56. is curious, and proves what originally were the sentiments of the two houses respecting this privilege. "Colonel Titus reported the bill for "the settlement of the post-office, with the amendments: Sir Walter "Carle delivered a proviso for the letters of all members of parliament "to go free, during their sitting: Sir Heneage Finch said, It was a "*poor mendicant proviso, and below the honor of the house.* Mr. Prynn "spoke also against the proviso: Mr. Bunckley, Mr. Boscawen, Sir "George Downing, and Serjeant Charlton, for it; the latter saying, "'The council's letters went free.' The question being called for, the "Speaker, Sir Harbottle Grimstone, was unwilling to put it; saying, "*he was ashamed of it;* nevertheless the proviso was carried, and "made part of the bill, which was ordered to be engrossed." This proviso the lords disagreed to, and left it out of the bill; and the commons agreed to their amendment. 3 *Hats.* 82.

(30) And that the great loss to the public revenue by the exercise of this privilege might be farther diminished, the 24 Geo. III. sess. 2. c. 37. provides, that no letter shall go free, unless the member shall write

whereby the annual amount of franked letters had gradually increased, from 23600*l.* in the year 1715, to 170700*l.* in the year 1763[d]. There cannot be devised a more eligible method than this, of raising money upon the subject: for therein both the government and the people find a mutual benefit. The government acquires a large revenue, and the people do their business with greater ease, expedition, and cheapness, than they would be able to do if no such tax (and of course no such office) existed (31).

d Com. Journ. 28 Mar. 1764.

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the whole of the superscription, and shall add his own name, and that of the post-town from which the letter is intended to be sent, and the day of the month in words at length, besides the year, which may be in figures; and unless the letter shall be put into the post-office of the place, so that it may be sent on the day upon which it is dated. And no letter shall go free directed to a member of either house, unless it is directed to him where he shall actually be at the delivery thereof; or to his residence in London, or to the lobby of his house of parliament. And if any person shall fraudulently counterfeit or alter such superscription, he shall be guilty of felony, and shall be transported for seven years. But, in case of bodily infirmity, a member may authorize another person to write the superscription.

By the 35 Geo. III. c. 53. the privilege of franking is still farther restrained. By that statute, no letter directed by or to any member shall go free, which shall exceed one ounce in weight, nor any letter directed by a member, unless he is within twenty miles of the post-town from which it is to be sent on the day, or the day before the day, on which it is put into the post-office. And no member shall send more than ten, or receive more than fifteen letters in one day, free from postage. Single letters sent and received by the non-commissioned officers and private men in the navy and army, under certain restrictions, shall be subject only to the postage of one penny each. By 42 Geo. III. c. 63. these acts are extended to the members for the united kingdom. It has been decided that under these statutes a Roman Catholic peer is not entitled to send or receive letters free from postage. Lord Petrie v. Lord Auckland, postmaster-general. 2 *Bos. & Pull.* 139.

(31) It was determined so long ago as the 13 W. III. by three of the judges of the court of King's Bench, though contrary to the pertina-

V. A FIFTH branch of the perpetual revenue consists in the stamp duties, which are a tax imposed upon all parchment and paper, whereon any legal proceedings, or private instruments of almost any nature whatsoever, are written; and also upon licenses for retailing wines, letting horses to hire, and for certain other purposes; and upon all almanacks, news-papers, advertisements, cards, dice, and pamphlets containing less than six sheets of paper. These imposts are very various, according to the nature of the things stamped, rising gradually from a penny to ten pounds. This is also a tax, which though in some instances it may be heavily felt, by

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cious opinion of lord C. J. Holt, that no action could be maintained against the postmaster-general, for the loss of bills or articles sent in letters by the post. 1 *Ld. Raym.* 646. *Comyns.* 100, &c. A similar action was brought against lord le Despencer and Mr. Carteret, postmasters-general, in 1778, to recover a bank-note of 100*l.* which had been sent by the post and was lost. Lord Mansfield delivered the opinion of the court, and proved, with much perspicuity and ability, that there was no resemblance or analogy between the postmasters and a master carrier, and that no action for any loss in the post-office could be brought against any person, except him by whose actual negligence the loss accrued; that this point seems as fully established as if it had been declared by the full authority of parliament. *Cowp.* 754.

For this reason it is recommended, by the secretary of the post-office, to cut bank-notes and to send one half at a time. This is the only safe mode of sending bank-notes, as the bank would never pay the holder of that half which had been fraudulently obtained.

Many attempts have been made by postmasters in country towns, to charge a halfpenny or a penny a letter upon delivery at the houses in the town above the parliamentary rates, under pretence that they were not obliged to carry the letters out of the office *gratis*; but it has been repeatedly decided, that such a demand is illegal, and that they are bound to deliver the letters to the inhabitants within the usual and established limits of the town, without any addition to the rate of postage. 5 *Burr.* 2709. 2 *Bl. Rep.* 906. *Cowp.* 182.

greatly increasing the expense of all mercantile as well as legal proceedings, yet (if moderately imposed) is of service to the public in general, by authenticating instruments, and rendering it much more difficult than formerly to forge deeds of any standing; since, as the officers of this branch of the revenue vary their stamps frequently, by marks perceptible to none but themselves, a man that would forge a deed of king William's time, must know and be able to counterfeit the stamp of that date also. In France and some other countries the duty is laid on the contract itself, not on the instrument in which it is contained; (as, with us too, besides the stamps on the indentures, a tax is laid by statute 8 Ann. c. 9. of 6*d*. in the pound, upon every apprentice-fee, if it be 50*l*. or under; and 1*s*. in the pound, if it be a greater sum;) but this tends to draw the subject into a thousand nice disquisitions and disputes concerning the nature of his contract, and whether taxable or not; in which the farmers of the revenue are sure to have the advantage[e] (32). Our general method answers the purposes of the state as well, and consults the ease of the subject much better. The first institution of the stamp duties was by statute 5 & 6 W. & M. c. 21. and they have since in many instances been increased to ten times their original amount (33). [324]

[e] Sp. of L. b. xiii. c. 9.

(32) It is considered a rule of construction of revenue acts, in ambiguous cases, to lean in favor of the revenue. This rule is agreeable to good policy and the public interests; but, beyond that, which may be regarded as established law, no one can ever be said to have an undue advantage in our courts.

(33) And perhaps by ten different acts of parliament. It is certainly true, that the items of seven different long statutes must be picked out and summed up, to produce the present stamp duty upon an indenture,

VI. A SIXTH branch is the duty upon houses and windows. As early as the conquest mention is made in domes-day book of fumage or fuage, vulgarly called smoke farthings; which were paid by custom to the king for every chimney in the house. And we read that Edward the black prince, (soon after his successes in France,) in imitation of the English custom, imposed a tax of a florin upon every hearth in his French dominions[f]. But the first parliamentary establishment of it in England was by statute 13 & 14 Car. II. c. 10. whereby an hereditary revenue of 2*s*. for every hearth, in all houses paying to church and poor, was granted to the king for ever. And, by subsequent statutes for the more regular assessment of this tax, the constable and two other substantial inhabitants of the parish, to be appointed yearly, (or the surveyor, appointed by the crown, together with such constable or other public officer,) were, once in every year, empowered [325] to view the inside of every house in the parish. But, upon the revolution, by statute 1 W. & M. st. 1. c. 10. hearth-money was declared to be "not only a great "oppression to the poorer sort, but a badge of slavery upon "the whole people, exposing every man's house to be "entered into, and searched at pleasure, by persons unknown

[f] Mod. Un. Hist. xxiii. 463. Spelm. Gloss. tit. Fuage.

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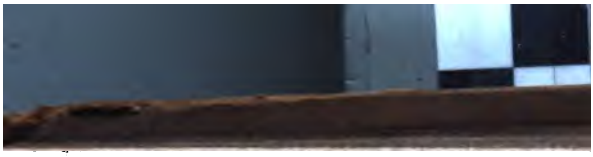
lease, or bond. One cannot but express surprise, that each new stamp-act has not consolidated the duties imposed upon the respective articles by former statutes. When a deed or instrument is produced in court, no one can say whether it is duly stamped or not, but by collecting together, with a great probability of an error, all the duties which lie dispersed in the various stamp-acts prior to its date.

If each stamp-act declared the whole amount of the stamp at the time, it would prevent much confusion and vexation in a subject of the highest importance. But till this plan is adopted by the legislature, Dr. Burn in the title *Stamps*, will be our readiest, if not our surest, guide.



"to him; and therefore, to erect a lasting monument of "their majesties goodness in every house in the kingdom, "the duty of hearth-money was taken away and abolished." This monument of goodness remains among us to this day: but the prospect of it was somewhat darkened, when in six years afterwards by statute 7 W. III c. 18. a tax was laid upon all houses (except cottages) of 2*s*. now advanced to 3*s*. *per annum*, and a tax also upon all windows, if they exceeded nine, in such house. Which rates have been from time to time[g] varied, being now extended to all windows exceeding six; and power is given to surveyors, appointed by the crown, to inspect the outside of houses, and also to pass through any house two days in the year, into any court or yard, to inspect the windows there. A new duty from 6*d*. to 1*s*. in the pound was also imposed by statutes 18 Geo. III. c. 16. and 19 Geo. III. c. 59. on every dwelling-house inhabited, together with the offices and gardens therewith occupied: which duty, as well as the former, is under the direction of the commissioners of the land tax (34).

VII. The seventh branch of the extraordinary perpetual revenue is a duty of 21*s*. *per annum* for every male servant retained or employed in the several capacities specifically mentioned in the act of parliament, and which almost amount to an universality, except such as are employed in husbandry, trade, or manufactures. This was imposed by statute 17 Geo. III. c. 39. amended by 19 Geo. III. c. 59. and is under the management of the commissioners of the land and window tax (35).

g Stat. 20 Geo. II. c. 3. 31 Geo. II. c. 22. 2 Geo. III. c. 8. 6 Geo. III. c. 38.

(34) The tax upon windows has been much increased by the commutation act the 24 Geo. III. sess. 2. c. 38. and by the 37 Geo. III. c. 105. besides a general addition of 20 *per cent.* upon the gross amount; and also by 42 Geo. III. c. 34.

See the subject particularly stated in Burn, tit. *House*.

(35) By the 25 Geo. III. c. 43. the former taxes upon servants were repealed, and fresh duties were imposed. These have since been

VIII. An eighth branch is the duty arising from licenses to hackney coaches and chairs in London, and the parts adjacent. In 1654 two hundred hackney coaches were allowed within London, Westminster, and six miles round, under the direction of the court of aldermen[h]. By statute 13 & 14 Car. II. c. 2. four hundred were licensed; and the money arising thereby was applied to repairing the streets[i]. This number was increased to seven hundred by statute 5 W. & M. c. 22. and the duties vested in the crown: and by the statute 9 Ann. c. 23. and other subsequent statutes for their government[j], there are now a thousand licensed coaches and four hundred chairs. This revenue is governed by commissioners of its own, and is, in truth, a benefit to the subject; as the expense of it is felt by no individual, [326] and its necessary regulations have established a competent jurisdiction, whereby a very refractory race of men may be kept in some tolerable order (36).

IX. The ninth and last branch of the king's extraordinary perpetual revenue is the duty upon offices and pensions; consisting in an annual payment of 1*s.* in the pound (over and above all other duties[k]) out of all salaries, fees, and per-

h Scobell. 313.
i Com. Journ. 14 Feb. 1661.
j 10 Ann. c. 19. sec. 153. 12 Geo. I. c. 15. 7 Geo. III. c. 44. 10 Geo. III. c. 44. 11 Geo. III. c. 24. 28. 12 Geo. III. c. 4^c.
k Previous to this, a deduction of 6*d.* in the

increased by the 37 Geo. III. c. 107. and still farther by 42 Geo. III. c. 37. See Burn.

(36) In the year 1770 one thousand hackney coaches were licensed, for each of which the proprietors paid a tax of 5*s.* a week; by the 24 Geo. III. sess. 2. c. 27. that duty was doubled; so from this article, government derives a revenue of 26,000*l.* a year. In consequence of so great an increase in the duty upon them, the fares were altered by 26 Geo. III. c. 7. by which statute, explained by the 32 Geo. III. c. 47. the present fares were established. By the 42 Geo. III. c. 78. the number is increased to 1100, subject to the same regulations. See Burn, tit. *Hackney Coaches.*

quisities, of offices and pensions payable by the crown, exceeding the value of 100*l. per annum*. This highly popular taxation was imposed by statute 31 Geo. II. c. 22. and is under the direction of the commissioners of the land tax.

THE clear net produce of these several branches of the revenue, after all charges of collecting and management paid, amounts at present annually to about seven millions and three quarters sterling; besides more than two millions and a quarter raised by the land and malt tax (37). How these immense

pound was charged on all pensions and annuities, and all salaries, fees, and wages of all offices of profit granted by or derived from the crown; in order to pay the interest at the rate of three *per cent.* on one million, which was raised for discharging the debts of the civil list by statutes 7 Geo. I. st. 1. c. 27. 11 Geo. I. c. 17. and 12 Geo. I. c. 2. This million, being charged on this particular fund, is not considered as any part of the national debt.

(37) Since this was written by the author, that sum has been immensely augmented; for the following Account is taken from a statement of the ordinary revenues and extraordinary resources constituting the Public Income of Great Britain for the year ending the 5th January 1802, presented to the house of commons.

HEADS OF REVENUE.	Net Produce applicable to National Objects, and to Payments into the Exchequer.			Rate per cent. for which the net produce of the revenue was collected.		
ORDINARY REVENUES.						
PERMANENT TAXES.	£.	s.	d.	£.	s.	d.
Customs	7,756,107	3	9¼	6	15	0
Excise (including Malt, annual)	11,495,440	8	4¼	5	18	11
Stamps	3,036,856	17	1¼	3	19	5
Land and Assessed Taxes	4,715,393	4	10¼	3	15	6
Post Office	982,850	16	3	34	5	2
1*s.* in the £. on Pensions and Salaries	45,815	15	10¼	1	1	11
6*d.* in the £. on Pensions and Salaries	43,297	6	6¼	2	5	3
Hackney Coaches	23,704	15	2¼	10	1	5
Hawkers and Pedlars	5,926	8	9¼	50	13	5
Total of Ordinary Revenues	28,105,392	16	9¼	6	11	7

sums are appropriated, is next to be considered. And this is, first and principally, to the payment of the interest of the national debt.

In order to take a clear and comprehensive view of the nature of this national debt, it must first be premised, that after the revolution, when our new connections with Europe introduced a new system of foreign politics, the expenses of the nation, not only in settling the new establishment, but in main-

HEADS OF REVENUE.	Net Produce applicable to National Objects, and to payments into the Exchequer.	Rate per cent. for which the net produce of the revenue was collected.
Brought over....	28,105,392 16 9½	
SMALL BRANCHES OF THE HEREDITARY REVENUE.		
Alienation Fines	6,209 0 8	
Post Fine	2,535 10 6½	
Seisures	72,064 5 2½	
Compositions	0 10 0	
Proffers	617 0 4	
Crown Lands	40,959 17 11½	
EXTRAORDINARY RESOURCES.		
Monies paid on Account of Interest of Loans raised for the Service of Ireland	803,799 16 7	
On Account of the Commissioners appointed by Act 35 Geo. III. for issuing Exchequer Bills	62,100 0 0	
Fees of regulated Exchequer Offices	34,766 17 11	
For Corn sold on Account of Government	32,000 0 0	
Other Monies paid to the Public	4,272 7 3½	
Imprest Money repaid sundry public Accountants	66,007 18 10½	
Lottery net Profit	187,229 6 1	
Lottery Licenses	5,791 9 0	
Aid and Contributions	40,302 3 5	
Arrears of Taxes collected under the Aid and Contribution Act	87,635 8 2½	
Income Duty	5,858,792 1 9½	
Total, independent of the Loans	35,410,476 10 7½	
Loans paid into the Exchequer in the year ended 5th January 1802	27,611,410 17 8	
Grand Total	63,021,887 8 3½	

taining long wars, as principals, on the continent for the security of the Dutch barrier, reducing the French monarchy, settling the Spanish succession, supporting the house of Austria, maintaining the liberties of the Germanic body, and other purposes, increased to an unusual degree: insomuch that it was not thought advisable to raise all the expenses of any one year by taxes to be levied within that year, lest the unaccustomed weight of them should create murmurs among the people. It was therefore the policy of the times to anticipate the revenues of their posterity, by borrowing immense sums for the current service of the state, and to lay no more taxes upon the subject than would suffice to pay the annual interest of the sums so borrowed: by this means converting the principal debt into a new species of [327] property, transferable from one man to another at any time and in any quantity. A system which seems to have had its original in the state of Florence, *A. D.* 1344: which government then owed about 60,000*l.* sterling: and, being unable to pay it, formed the principal into an aggregate sum, called metaphorically a *mount* or *bank*, the shares whereof were transferable like our stocks, with interest at 5 *per cent.* the prices varying according to the exigencies of the state[1]. This policy of the English parliament laid the foundation of what is called the national debt: for a few long annuities created in the reign of Charles II. will hardly deserve that name. And the example then set has been so closely followed during the long wars in the reign of queen Anne, and since, that the capital of the national debt (funded and unfunded) amounted at the close of the session in June 1777, to about an hundred and thirty-six millions (38):

1 Pro tempore, pro spe, pro commodo, minuitur eorum pretium atque augescit. Aretin. See Mod. Un. Hist. xxxvi. 116.

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(38) The national debt in 1755, previous to the French war, was } £.72,289,000; Interest £.2,654,000

In January 1776, before the American war, it was } 123,964,000; ditto 4,411,000

to pay the interest of which, together with certain annuities for lives and years, and the charges of manage-

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In 1786, previous to which the whole debt of the last war was not funded, it was } 239,154,000; Interest 9,275,000

See a Brief Examination into the State of the Revenue.

But the select committee on finance, in March 1797, reported that the total amount of the public debts, on the 5th of Jan. 1793, in funded capital, was ..... £. 238,231,248

The annual interest and charge of management amounted then to ..... £. 9,325,866

The public funded debt upon the 5th of January 1797 was £. 327,071,370

The annual interest and charge of that debt was ..... £.	12,507,489
The annual sum appropriated for its reduction	1,923,154
The total annual charge of the public debt, on the 5th of January 1797 ..... £.	14,430,643

The following is the statement of the public debt, as it stood on the 1st Feb. 1802.

Old permanent debt ..... £.	238,231,248
Redeemed by the land tax	18,001,148
Debt. on 1st Feb. 1802 ..... £.	220,230,100
Permanent debts created between 1793 and 1802	241,981,355
Ditto between 1797 and 1802 for Ireland	19,708,750
£.	481,920,205
Non-permanent debts created by duties upon income	56,445,000
£.	538,365,205

Of this sum £.78,376,459 has been already redeemed, and the whole is in a course of gradual liquidation.

ment (39), amounting annually to upwards of four millions and three quarters, the extraordinary revenues just now enumerated (excepting only the land tax and annual malt tax) are in the first place mortgaged, and made perpetual by parliament. Perpetual, I say; but still redeemable by the same authority that imposed them; which, if it at any time can pay off the capital, will abolish those taxes which are raised to discharge the interest.

By this means the quantity of property in the kingdom is greatly increased in idea, compared with former times: yet, if we coolly consider it, not at all increased in reality. We may boast of large fortunes, and quantities of money in the funds. But where does this money exist? It exists only in name, in paper, in public faith, in parliamentary security: and that is undoubtedly sufficient for the creditors of the public to rely on. But then what is the pledge which the public faith has pawned for the security of these debts? The land, the trade, and the personal industry of the subject; from which the money must arise that supplies the several taxes. In these therefore, and these only, the property of the public creditors does really and intrinsically [328] exist: and of course the land, the trade, and the personal industry of individuals, are diminished in their true value just so much as they are pledged to answer. If A's income amounts to 100*l. per annum;* and he is so far indebted

The annual sum appropriated for the payment of the interest, &c. is,

To the public for annual interest	£. 16,848,781
To the bank of England, &c. for charges of management	234,535
To the commissioners towards the redemption of the public debt	5,809,330
	£. 22,892,646

The commissioners for the reduction of the national debt usually receive besides an annual grant of £. 200,000.

(39) The number of officers employed in collecting this vast revenue, Sir John Sinclair estimates at 12,500. 3 Part, 157.

In France the revenue officers amount to 250,000. *Ib.* 156.

to B, that he pays him 50*l. per annum* for his interest; one half of the value of A's property is transferred to B the creditor. The creditor's property exists in the demand which he has upon the debtor, and no where else; and the debtor is only a trustee to his creditor for one half of the value of his income. In short, the property of a creditor of the public consists in a certain portion of the national taxes: by how much therefore he is the richer, by so much the nation, which pays these taxes, is the poorer (40).

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(40) It is a very erroneous notion indeed to suppose, that the property of the kingdom is increased by national debts, contracted in consequence of the expenses of war. On the contrary, the principal of the debt is the exact amount of the property which the nation has lost from its capital for ever. The American war cost the nation 116 millions sterling, and the effect is precisely the same as if so much of its wealth and treasure in corn, cattle, cloth, ammunition, coin, &c. had been collected together, and thrown into the sea, besides the loss accruing from the destruction of many of its most productive hands. When this property is consumed, it never can be retrieved, though industry and care may acquire and accumulate new stores. Such a supply, by no mode of taxation that has yet been devised, could be collected at once, without exhausting the patience and endurance of the people. But by the method of funding, the subjects are induced to suppose, that their suffering consists only in the payment of the yearly interest of this immense waste. The ruin is completed before the interest commences, for that is paid by the nation to the nation, and returns back to its former channel and circulation; like the balls in a tennis court, however they may be tossed from one side to the other, their sum and quantity, within the court, continue the same. The extravagance of individuals naturally suggested the system of funding public debts. When a man cannot satisfy the immediate demands of his creditor, it is an obvious expedient to give him a promissory note, to pay him at a future day, with interest for the time; and if this is an assignable note, so that the creditor may be enabled to persuade another to advance him the principal and to stand in his place, it is exactly similar to the debts or securities of government, except that, in general, they are not payable at any definite time. All debts,

THE only advantage, that can result to a nation from public debts, is the increase of circulation by multiplying the cash of the kingdom, and creating a new species of currency, assignable at any time and in any quantity; always therefore ready to be employed in any beneficial undertaking, by means of this its transferable quality; and yet producing some profit even when it lies idle and unemployed. A certain proportion of debt seems therefore to be highly useful to a trading people; but what that proportion is, it is not for me to determine. Thus much is indisputably certain, that the present magnitude of our national incumbrances very far exceeds all calculations of commercial benefit, and is productive of the greatest inconve-

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when no effects remain, both in public and private, are certain evidence of the waste and consumption of so much property, which nothing can restore, though frugality and industry may alleviate the future consequences. When a debt is contracted, a man is not richer for paying it; if he owes one hundred pounds, and pays interest for it, he is in no degree richer by calling in one hundred pounds from which he receives the same interest, and therewith discharges the debt; but probably, if he does so, he will feel himself more comfortable and independent, and will find his credit higher, if his occasions should oblige him to borrow in future. So it is with governments; when the debt is contracted, and the money spent, the mischief is done, the discharge of the debt can add nothing (or little comparitively) immediately to the the stock or capital of the nation. But yet these important consequences may be expected from it; viz. from the abolition of taxes upon candles, soap, salt, beer, and upon a melancholy catalogue of the necessary articles of life, taxes which take from those who have nothing to spare, the price of labor would be lowered, manufactures would flourish with renewed vigor, the minds of the people would be cheered, and the nation would again have credit and spirit to meet its most formidable enemies, and to repel and resent both injury and insult. All the nations of Europe have learnt from such dear-bought experience, that poverty and misery are the inevitable consequences of war, as to give us reason to hope, that the lives and property of mankind will not, in future, be dissipated with the profusion and wantonnes of former times.

niences. For, first, the enormous taxes, that are raised upon the necessaries of life for the payment of the interest of this debt, are a hurt both to trade and manufactures, by raising the price as well of the artificer's subsistence, as of the raw material, and of course, in a much greater proportion, the price of the commodity itself. Nay, the very increase of paper-circulation itself, when extended beyond what is requisite for commerce or foreign exchange, has a natural tendency to increase the price of provisions as well as of all other merchandise. For, as its effect is to multiply the cash of the kingdom, and this to such an extent that much must remain unemployed, that cash (which is the universal measure [329] of the respective values of all other commodities) must necessarily sink in its own value [m], and every thing grow comparatively dearer. Secondly, if part of this debt be owing to foreigners, either they draw out of the kingdom annually a considerable quantity of specie for the interest; or else it is made an argument to grant them unreasonable privileges, in order to induce them to reside here. Thirdly, if the whole be owing to subjects only, it is then charging the active and industrious subject, who pays his share of the taxes, to maintain the indolent and idle creditor who receives them. Lastly, and principally, it weakens the internal strength of a state, by anticipating those resources which should be reserved to defend it in case of necessity (41). The interest we

[m] See page 276.

(41) The last is certainly a serious and unanswerable objection to the increase of the national debt; but the three first objections made by the learned Judge do not seem to be very satisfactory. It is not clear that it is an evil, that things should grow nominally dear in proportion to the increase of specie, or the medium of commerce; for they will still retain their relative, or comparative values with each other. Dr. Adam Smith has ably shewn the benefit which a country derives, from substituting any cheap article for gold and silver. The consequence is, that the precious metals do not become of less value; or if so, it is but in a small degree; but they are carried to a

now pay for our debts would be nearly sufficient to maintain any war, that any national motives could require. And if our ancestor's in king William's time had annually paid, so long as their exigences lasted, even a less sum than we now annually raise upon their accounts, they would in the time of war have borne no greater burdens, than they have bequeathed to and settled upon their posterity in time of peace; and might have been eased the instant the exigence was over.

THE respective produces of the several taxes before-mentioned were originally separate and distinct funds; being securities for the sums advanced on each several tax, and for them only. But at last it became necessary, in order to avoid confusion, as they multiplied yearly, to reduce the number of these separate funds, by uniting and blending them together; superadding the faith of parliament for the general security of the whole. So that there are now only three capital funds of any account, the *aggregate* fund, and the *general*

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foreign market, and bring back an increase of capital to the country. If one million pounds worth of paper, or shells, would answer as well to settle accounts, go to market, and would serve all the purposes of gold and silver, whilst these preserved their price abroad; and if the coin of this country, at present, amount to 30 millions, we should gain what was equivalent to 29 millions by the substitution. But the paper security, created by the national debt, is little used in payments, or as a medium of commerce, like bills of exchange.

As to the second objection, foreigners can only take away the interest of money which they have actually brought into the country, and which, it must be presumed, our merchants are deriving as great a benefit from, and probably much greater.

With regard to the third objection, I cannot think it sound discretion ever to raise an invidious distinction between those who pay, and those who receive the taxes, and to treat the latter with contempt. It cannot be supposed that property will ever be accumulated by idleness and indolence; and he surely deserves the best of his country, who, in disposing of the fruits of his industry, prefers the funds to any other security: for without such confidence, the nation would soon be reduced to a state of bankruptcy and ruin.

fund, so called from such union and addition; and the *south sea* fund, being the produce of the taxes appropriated to pay the interest of such part of the national debt as was advanced by that company and its annuitants. Whereby the separate funds, which were thus united, are become mutual securities for each other; and the whole produce of them, thus aggregated, liable to pay such interest or annuities as were
[330] formerly charged upon each distinct fund; the faith of the legislature being moreover engaged to supply any casual deficiencies.

THE customs, excises, and other taxes, which are to support these funds, depending on contingencies, upon exports, imports, and consumptions, must necessarily be of a very uncertain amount; but though some of them have proved unproductive, and others deficient, the sum total hath always been considerably more than was sufficient to answer the charge upon them. The surplusses therefore of the three great national funds, the aggregate, general, and south sea funds, over and above the interest and annuities charged upon them, are directed by statute 3 Geo. I. c. 7. to be carried together, and to attend the disposition of parliament; and are usually denominated the *sinking* fund, because originally destined to sink and lower the national debt. To this have been since added many other entire duties, granted in subsequent years; and the annual interest of the sums borrowed on their respective credits is charged on and payable out of the produce of the sinking fund. However, the neat surplusses and savings, after all deductions paid, amount annually to a very considerable sum. For as the interest on the national debt has been at several times reduced, (by the consent of the proprietors, who had their option either to lower their interest or be paid their principal,) the savings from the appropriated revenues came at length to be extremely large. This sinking fund is the last resort of the nation; its only domestic resource on which must chiefly depend all the hopes we can entertain of ever discharging or moderating our incum-

brances. And therefore the prudent and steady application of the large sums now arising from this fund, is a point of the utmost importance, and well worthy the serious attention of parliament; which was thereby enabled, in the year 1765, to reduce above two millions sterling of the public debt: and several additional millions in several succeeding years (42).

BUT, before any part of the aggregate fund (the surpluses whereof are one of the chief ingredients that form the sinking fund) can be applied to diminish the principal of the

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(42) By the 26 Geo. III. c. 31. the parliament had the wisdom and firmness to vest unalienably in commissioners, the sum of 1,000,000*l.* annually for the reduction of the national debt; in which act every possible precaution was taken that could be devised, for preventing this fund from being diverted at any future time, and for carrying to the account of the commissioners for the purposes of the act the interest of such stock as should be purchased, and such temporary annuities as should fall in.

By that act it was provided, that when the whole sum, including the annual million, should amount to four millions, the dividends should no longer be paid upon the redeemed stock, and that the sinking fund should no longer accumulate.

By the 32 Geo. III. c. 55. it was directed, that, when the dividends amounted to 3,000,000*l.* exclusive of the annual grant, there should be no further accumulation.

And it was provided, that, upon all future loans which were not to be paid off within 45 years, one *per cent.* should be annually appropriated for their reduction.

By the 33 Geo. III. c. 22. an additional grant of 200,000*l.* was made for the same purpose, which has since been annually renewed.

The 42 Geo. III. c. 71. repeals so much of the 26 Geo. III. and 32 Geo. III. as fixed a limit to the accumulation of the sinking fund, and consolidates the funds provided by each act, and states that by the accumulation of that joint fund the whole national debt may be redeemed in forty-five years.

The wisdom of keeping this fund inviolable, is striking; for during a peace it provides resources against the periods of war and difficulty, it supports public credit by keeping the funds steady and uniform, and even in the times of the greatest depression the country derives the benefit of the rapidity of their redemption.

public debt, it stands mortgaged by parliament to raise an annual sum for the maintenance of the king's houshold and the civil list. For this purpose, in the late reigns, the produce of certain branches of the excise and customs, the post-office, the duty on wine licenses, the revenues of the remaining crown lands, the profits arising from courts of justice, (which articles include all the hereditary revenues of the crown,) and also a clear annuity of 120,000*l.* in money, were settled on the king for life, for the support of his majesty's houshold, and the honor and dignity of the crown. And, as the amount of these several branches was uncertain, (though in the last reign they were computed to have sometimes raised almost a million,) if they did not arise annually to 800,000*l.* the parliament engaged to make up the deficiency. But his present majesty having, soon after his accession, spontaneously signified his consent, that his own hereditary revenues might be so disposed of as might best conduce to the utility and satisfaction of the public; and having graciously accepted the limited sum of 800,000*l.* *per annum* for the support of his civil list; the said hereditary and other revenues were carried into and made a part of the

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The following is the state of the sinking fund on the 1st of February 1802.

Redeemed by the new sinking fund	£. 20,490,003
Ditto old sinking fund	39,885,308
Total redeemed	£. 60,375,311
Transferred to the commissioners by land-tax redeemed	18,001,148
Debt reduced at 1st Feb. 1802	£. 78,376,459

Sums applicable to the reduction of the public debt on the 1st of February 1802.

New sinking fund	£. 3,275,143
Old ditto	2,534,187
Total sinking fund	£. 5,809,330

aggregate fund, and the aggregate fund was charged[n] with the payment of the whole annuity to the crown of 800,000*l.* which, being found insufficient, was increased in 1777 to 900,000*l. per annum*. Hereby the revenues themselves, being put under the same care and management as the other branches of the public patrimony, produce more and are better collected than heretofore; and the public is still a gainer of near 100,000*l. per annum* by this disinterested conduct of his majesty. The civil list, thus liquidated, together with the four millions and three quarters, interest of the national debt, and more than two millions produced from the sinking fund, make up the seven millions and three quarters *per annum*, neat money, which were before stated to be the annual produce of our *perpetual* taxes; besides the immense, though uncertain, sums arising from the *annual* taxes on land and malt, but which, at an average, may be calculated [332] at more than two millions and a quarter; and, added to the preceding sum, make the clear produce of the taxes (exclusive of the charge of collecting) which are raised yearly on the people of this country, amount to about ten millions sterling (43).

The expenses defrayed by the civil list are those that in any shape relate to civil government; as, the expenses of the royal household; the revenues allotted to the judges, previous to the year 1758; all salaries to officers of state, and every of the king's servants; the appointments to foreign embassadors; the maintenance of the queen and royal family; the king's private expenses, or privy purse; and other very numerous outgoings, as secret service money, pensions, and other bounties: which sometimes have so far exceeded the revenues appointed for that purpose, that application has been made to parliament to discharge the debts contracted on the civil list; as particularly in 1724, when one million[o] was granted for that purpose by the statute 11 Geo. I. c. 17. and

[n] Stat. 1 Geo. III. c. 1. [o] See page 336.

(43) See notes 37, 38, and 39, to this chapter.

in 1769 and 1777, when half a million and 600,000*l.* were appropriated to the like uses, by the statutes 9 Geo. III. c. 34. and 17 Geo. III. c. 47.

THE civil list is indeed properly the whole of the king's revenue in his own distinct capacity; the rest being rather the revenue of the public, or its creditors, though collected and distributed again, in the name and by the officers of the crown: it now standing in the same place as the hereditary income did formerly; and, as that has gradually diminished, the parliamentary appointments have increased. The whole revenue of queen Elizabeth did not amount to more than 600,000*l.* a year[o]: that of king Charles I. was[p] 800,000*l.* (44), and the revenue voted for king Charles II. was[q] 1,200,000*l.* though complaints were made (in the first years at least) that it did not amount to so much[r]. But it must be observed, that under these sums were included all manner of public expenses; among which lord Clarendon in his speech to the parliament computed, that the charge of the navy and land forces amounted annually to 800,000*l.* which was ten [333] times more than before the former troubles[s]. The same revenue, subject to the same charges, was settled on king James II[t], but by the increase of trade, and more frugal management, it amounted on an average to a million and a half *per annum*, (besides other additional customs, granted by parliament[u], which produced an annual revenue of 400,000*l.*) out of which his fleet and army were maintained at the yearly expense of[w] 1,100,000*l.* After the revolution, when the parliament took into its own hands the annual support of the forces both maritime and military, a civil list revenue was settled on the new king and queen, amounting, with

o Lord Clar. continuation. 163.
p Com. Journ. 4 Sept. 1660.
q Ibid.
r Ibid. 4 Jun. 1663. Lord Clar. ibid.
s Lord Clar. 166.
t Stat. 1 Jac. II. c. 1.
u Ibid. c. 3 and 4.
w Com. Journ. 1 Mar. 20 Mar. 1688.

(44) The revenue of the commonwealth was upwards of 1,500,000*l.* (*Sinc. Hist. Rev.* 2 vol. xiv.) This is a striking instance to prove, that the burdens of the people are not necessarily lightened by a change in the government.

the hereditary duties, to 700,000*l. per annum*[x]; and the same was continued to queen Anne and king George I[y]. That of king George II, we have seen, was nominally augmented to[z] 800,000*l.* and in fact was considerably more: and that of his present majesty is avowedly increased to the limited sum of 900,000*l.* And upon the whole it is doubtless much better for the crown, and also for the people, to have the revenue settled upon the modern footing rather than the ancient. For the crown; because it is more certain, and collected with greater ease: for the people; because they are now delivered from the feodal hardships, and other odious branches of the prerogative. And though complaints have sometimes been made of the increase of the civil list, yet if we consider the sums that have been formerly granted, the limited extent under which it is now established, the revenues and prerogatives given up in lieu of it by the crown, the numerous branches of the present royal family and (above all) the diminution of the value of money compared with what it was worth in the last century, we must acknowledge these complaints to be void of any rational foundation; and that it is impossible to support that dignity, which a king of Great Britain should maintain, with an income in any degree less than what is now established by parliament.

THIS finishes our inquiries into the fiscal prerogatives of the king; or his revenue, both ordinary and extraordinary. We have therefore now chalked out all the principal outlines of this vast title of the law, the supreme executive magistrate, or the king's majesty, considered in his several capacities and points of view. But, before we entirely dismiss this subject, it may not be improper to take a short comparative review of the power of the executive magistrate, or prerogative of the crown, as it stood in former days, and as it stands at present. And we cannot but observe, that most of the laws for ascertaining, limiting, and restraining this prerogative have been made within the compass of little [334]

x Com. Journ. 14 Mar. 1701. y Ibid. 17 Mar. 1701. 11 Aug. 1714. z Stat. 1 Geo. II. c. 1.

more than a century past; from the petition of right in 3 Car. I. to the present time. So that the powers of the crown are now to all appearance greatly curtailed and diminished since the reign of king James the first: particularly, by the abolition of the star chamber and high commission courts in the reign of Charles the first, and by the disclaiming of martial law, and the power of levying taxes on the subject, by the same prince: by the disuse of forest laws for a century past: and by the many excellent provisions enacted under Charles the second; especially the abolition of military tenures, purveyance, and pre-emption; the *habeas corpus* act; and the act to prevent the discontinuance of parliaments for above three years: and, since the revolution, by the strong and emphatical words in which our liberties are asserted in the bill of rights, and act of settlement; by the act for triennial, since turned into septennial, elections; by the exclusion of certain officers from the house of commons; by rendering the seats of the judges permanent, and their salaries liberal and independent; and by restraining the king's pardon from obstructing parliamentary impeachments. Besides all this, if we consider how the crown is impoverished and stripped of all its ancient revenues, so that it must greatly rely on the liberality of parliament for its necessary support and maintenance, we may perhaps be led to think, that the balance is inclined pretty strongly to the popular scale, and that the executive magistrate has neither independence nor power enough left to form that check upon the lords and commons, which the founders of our constitution intended.

[335] But, on the other hand, it is to be considered, that every prince, in the first parliament after his accession, has by long usage a truly royal addition to his hereditary revenue settled upon him for his life; and has never any occasion to apply to parliament for supplies, but upon some public necessity of the whole realm. This restores to him that constitutional independence, which at his first accession seems, it must be owned, to be wanting. And then, with regard to power,

we may find perhaps that the hands of government are at least sufficiently strengthened; and that an English monarch is now in no danger of being overborne by either the nobility or the people. The instruments of power are not perhaps so open and avowed as they formerly were, and therefore are the less liable to jealous and invidious reflections; but they are not the weaker upon that account. In short, our national debt and taxes (besides the inconveniences before mentioned) have also in their natural consequences thrown such a weight of power into the executive scale of government, as we cannot think was intended by our patriot ancestors; who gloriously struggled for the abolition of the then formidable parts of the prerogative, and by an unaccountable want of foresight established this system in their stead. The entire collection and management of so vast a revenue, being placed in the hands of the crown, have given rise to such a multitude of new officers created by and removable at the royal pleasure, that they have extended the influence of government to every corner of the nation. Witness the commissioners and the multitude of dependants on the customs, in every port of the kingdom; the commissioners of excise, and their numerous subalterns, in every inland district; the postmasters, and their servants, planted in every town, and upon every public road; the commissioners of the stamps, and their distributors, which are full as scattered and full as numerous; the officers of the salt duty, which though a species of excise, and conducted in the same manner, are yet made a distinct corps from the ordinary managers of that revenue; the surveyors of houses and windows; the receivers of the land tax; the managers of lotteries; and the commissioners of hackney coaches; all which are either mediately or immediately appointed by the crown, and [336] removable at pleasure without any reason assigned: these, it requires but little penetration to see, must give that power, on which they depend for subsistence, an influence most amazingly extensive. To this may be added the frequent opportunities of conferring particular obligations, by preference

in loans, subscriptions, tickets, remittances, and other money-transactions, which will greatly increase this influence; and that over those persons whose attachment, on account of their wealth, is frequently the most desirable. All this is the natural, though perhaps the unforeseen consequence of erecting our funds of credit, and to support them establishing our present perpetual taxes: the whole of which is entirely new since the restoration in 1660; and by far the greatest part since the revolution in 1688. And the same may be said with regard to the officers in our numerous army, and the places which the army has created. All which put together give the executive power so persuasive an energy with respect to the persons themselves, and so prevailing an interest with their friends and families, as will amply make amends for the loss of external prerogative.

But, though this profusion of offices should have no effect on individuals, there is still another newly acquired branch of power; and that is, not the influence only, but the force of a disciplined army: paid indeed ultimately by the people, but immediately by the crown: raised by the crown, officered by the crown, commanded by the crown. They are kept on foot it is true only from year to year, and that by the power of parliament: but during that year they must, by the nature of our constitution, if raised at all, be at the absolute disposal of the crown. And there need but few words to demonstrate how great a trust is thereby reposed in the prince by his people. A trust, that is more than equivalent to a thousand little troublesome prerogatives.

Add to all this, that besides the civil list, the immense revenue of almost seven millions sterling, which is annually paid to the creditors of the public, or carried to the sinking fund,
[337] is first deposited in the royal exchequer, and thence issued out to the respective offices of payment. This revenue the people can never refuse to raise, because it is made perpetual by act of parliament: which also, when well considered, will appear to be a trust of great delicacy and high importance.

Upon the whole therefore I think it is clear, that, whatever may have become of the *nominal*, the *real* power of the crown has not been too far weakened by any transactions in the last century. Much is indeed given up; but much is also acquired. The stern commands of prerogative have yielded to the milder voice of influence: the slavish and exploded doctrine of non-resistance has given way to a military establishment by law; and to the disuse of parliaments has succeeded a parliamentary trust of an immense perpetual revenue. When, indeed, by the free operation of the sinking fund, our national debts shall be lessened; when the posture of foreign affairs, and the universal introduction of a well-planned and national militia, will suffer our formidable army to be thinned and regulated; and when (in consequence of all) our taxes shall be gradually reduced; this adventitious power of the crown will slowly and imperceptibly diminish, as it slowly and imperceptibly rose. But, till that shall happen, it will be our especial duty, as good subjects and good Englishmen, to reverence the crown, and yet guard against corrupt and servile influence from those who are intrusted with its authority; to be loyal, yet free; obedient, and yet independent; and, above every thing, to hope that we may long, very long, continue to be governed by a sovereign, who, in all those public acts that have personally proceeded from himself, hath manifested the highest veneration for the free constitution of Britain; hath already in more than one instance remarkably strengthened its outworks; and will therefore never harbor a thought, or adopt a persuasion, in any the remotest degree detrimental to public liberty.

CHAPTER THE NINTH.

OF SUBORDINATE MAGISTRATES.

IN a former chapter of these commentaries[a] we distinguished magistrates into two kinds; supreme, or those in whom the sovereign power of the state resides; and subordinate, or those who act in an inferior secondary sphere. We have hitherto considered the former kind only; namely, the supreme legislative power or parliament, and the supreme executive power, which is the king: and are now to proceed to inquire into the rights and duties of the principal subordinate magistrates.

AND herein we are not to investigate the powers and duties of his majesty's great officers of state, the lord treasurer, lord chamberlain, the principal secretaries, or the like; because I do not know that they are in that capacity in any considerable degree the objects of our laws, or have any very important share of magistracy conferred upon them: except that the secretaries of state are allowed the power of commitment, in order to bring offenders to trial[b]. Neither shall I here treat of the office and authority of the lord chancellor, or the other judges of the superior courts of justice; because they will find a more proper place in the third part of these

[a] Ch. 2. page 146.
[b] 1 Leon. 70. 2 Leon. 175. Comb. 143. 5 Mod. 84. Salk. 347. Carth. 391.

commentaries. Nor shall I enter into any minute disquisitions, with regard to the rights and dignities of mayors and aldermen, or other magistrates of particular corporations; because these are mere private and strictly municipal rights, depending entirely upon the domestic [339] constitution of their respective franchises. But the magistrates and officers, whose rights and duties it will be proper in this chapter to consider, are such as are generally in use, and have a jurisdiction and authority dispersedly throughout the kingdom: which are, principally sheriffs; coroners; justices of the peace; constables; surveyors of highways; and overseers of the poor. In treating of all which I shall inquire into, first, their antiquity and original; next, the manner in which they are appointed and may be removed; and lastly, their rights and duties. And first of sheriffs,

I. The sheriff is an officer of very great antiquity in this kingdom, his name being derived from two Saxon words, ſcire ȝepeꝛa, the reeve, bailiff, or officer of the shire. He is called in Latin *vice-comes*, as being the deputy of the earl or *comes*; to whom the custody of the shire is said to have been committed at the first division of this kingdom into counties. But the earls in process of time, by reason of their high employments and attendance on the king's person, not being able to transact the business of the county, were delivered of that burden[c]; reserving to themselves the honor, but the labor was laid on the sheriff. So that now the sheriff does all the king's business in the county; and though he be still called *vice-comes*, yet he is entirely independent of, and not subject to the earl; the king by his letters patent committing *custodiam comitatus* to the sheriff, and him alone.

Sheriffs were formerly chosen by the inhabitants of the several counties. In confirmation of which it was ordained by statute 28 Edw. I. c. 8. that the people should have elec-

c Dalton of sheriffs, c. 1.

tion of sheriffs in every shire, where the shrievalty is not of inheritance. For anciently in some counties the sheriffs were hereditary; as I apprehend they were in Scotland till the statute 20 Geo. II. c. 43; and still continue in [340] the county of Westmorland to this day (1): the city of London having also the inheritance of the shrievalty of Middlesex vested in their body by charter[d] (2). The reason of these popular elections is assigned in the same statute, c. 13. "that the commons might choose such as "would not be a burden to them." And herein appears plainly a strong trace of the democratical part of our constitution; in which form of government it is an indispensable requisite, that the people should choose their own magistrates[e]. This election was in all probability not absolutely vested in the commons, but required the royal approbation. For in the Gothic constitution, the judges of the county courts (which office is executed by our sheriff) were elected by the people, but confirmed by the king: and the form of their election was thus managed: the people, or *incolae territorii* chose *twelve* electors, and they nominated *three* persons *ex*

d 3 Rep. 72. e Montesq. Sp. L. b. 2. c. 2.

(1) The earl of Thanet is hereditary sheriff of Westmorland. This office may descend to, and be executed by, a female; for "Ann countess "of Pembroke had the office of hereditary sheriff of Westmorland, and "exercised it in person. At the assizes at Appleby she sat with the "judges on the bench." *Harg. Co. Litt.* 326.

(2) The election of the sheriffs of London and Middlesex was granted to the citizens of London for ever in very ancient times, upon condition of their paying 300*l.* a year to the king's exchequer. In consequence of this grant, they have always elected two sheriffs, though these constitute together but one officer; and if one die, the other cannot act till another is elected. (4 *Bac. Abr.* 447.) In the year 1748, the corporation of London made a by-law, imposing a fine of 600*l.* upon every person, who, being elected, should refuse to serve the office of sheriff. See the case of Evans, esq. and the chamberlain of London, 2 *Burn. E. L.* 185.

quibus rex unum confirmabat [f]. But with us in England these popular elections, growing tumultuous, were put an end to by the statute 9 Edw. II. st. 2. which enacted, that the sheriffs should from thenceforth be assigned by the chancellor, treasurer, and the judges; as being persons in whom the same trust might with confidence be reposed. By statutes 14 Edw. III. c. 7. 23 Hen. VI. c. 8. and 21 Hen. VIII. c. 20. (3) the chancellor, treasurer, president of the king's council, *chief* justices, and *chief* baron, are to make this election; and that on the morrow of All Souls in the exchequer. And the king's letters patent, appointing the new sheriffs, used commonly to bear date the sixth day of November [g]. The statute of Cambridge, 12 Ric. II. c. 2. ordains, that the chancellor, treasurer, keeper of the privy seal, steward of the king's house, the king's chamberlain, clerk of the rolls, the justices of the one bench and the other, barons of the exchequer, and all other that shall be called to ordain, name, or make justices of the peace, *sheriffs*, and other officers of the king, shall be sworn to act indifferently, and to appoint no man that sueth either privily or openly to be put in office, but such only as they shall judge to be the best and most sufficient. And the custom now is (and has been at least ever since the time of Fortescue [h], who was chief justice and chancellor to Henry the sixth) that all the judges, together with the other great officers and privy counsellors, meet in the exchequer on the morrow of All Souls yearly, (which day is now altered to the morrow of St. Martin by the last act for abbreviating Michaelmas term,) and then and there the judges propose three persons, to be reported (if approved of) to the king, who afterwards appoints one of them to be sheriff (4). [341]

f Stiern. de jure Goth. l. 1. c. 3. g Stat. 12 Edw. IV. c. 1. h de L. L. c. 24.

(3) This last statute, as is observed by Mr. Wooddeson, 1 vol. 89. seems quite to a different purpose.

(4) The following is the present mode of nominating sheriffs in the exchequer on the morrow of St. Martin;

THIS custom, of the *twelve* judges proposing *three* persons, seems borrowed from the Gothic constitution before mentioned; with this difference, that among the Goths the twelve nominors were first elected by the people themselves. And this usage of ours at its first introduction, I am apt to believe, was founded upon some statute, though not now to be found among our printed laws: first, because it is materially different from the direction of all the statutes before mentioned: which it is hard to conceive that the judges would have countenanced by their concurrence, or that Fortescue

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The chancellor, chancellor of the exchequer, the judges, and several of the privy council assemble, and an officer of the court administers an oath to them in old French, that they will nominate no one from favor, partiality, or any improper motive: this done, the same officer having the list of the counties in alphabetical order, and of those who were nominated the year preceding, reads over the three names, and the last of the three he pronounces to be the present sheriff; but where there has been a pocket-sheriff, he reads the three names upon the list, and then declares who is the present sheriff. If any of the ministry or judges have an objection to any person named in the list, he then mentions it, and another gentleman is nominated in his room; if no objection be made, some one rises and says, "to the two gentlemen I "know no objection, and I recommend A. B. esq. in the room of the "present sheriff."

Another officer has a paper with a number of names given him by the clerk of assize for each county, which paper generally contains the names of the gentlemen upon the former list, and also of gentlemen who are likely to be nominated, and whilst the three are nominated, he prefixes 1, 2, or 3, to their names, according to the order in which they are placed; which, for greater certainty, he afterwards reads over twice. Several objections are made to gentlemen; some, perhaps, at their own request; such as, that they are abroad, that their estates are small and incumbered, that they have no equipage, that they are practising barristers, or officers in the militia, &c.

The new sheriff is generally appointed about the end of the following Hilary term; this extension of the time was, probably, in consequence of the 17 Edw. IV. c. 7. which enables the old sheriff to hold his office over Michaelmas and Hilary terms.

would have inserted in his book, unless by the authority of some statute: and also because a statute is expressly referred to in the record, which sir Edward Coke tells us[j] he transcribed from the council book of 3 March, 34 Hen. VI. and which is in substance as follows (5). The king had of his own authority appointed a man sheriff of Lincolnshire, which office he refused to take upon him: whereupon the opinions of the judges were taken, what should be done in this behalf. And the two chief justices, sir John Fortescue and sir John Prisot, delivered the unanimous opinion of them all; "that the "king did an error when he made a person sheriff, that was "not chosen and presented to him according to the *statute*; "that the person refusing was liable to no fine for disobe- "dience, as if he had been one of the *three* persons chosen "according to the tenor of the *statute*; that they would advise "the king to have recourse to the *three* persons that were "chosen according to the *statute*, or that some other thrifty "man be entreated to occupy the office for this year; and

[j] 2 Inst. 559.

(5) I am inclined to disagree with the learned Judge's conjecture, that the present practice originated from a statute which cannot now be found; because, if such a statute ever existed, it must have been passed between the date of this record, the 34 Hen. VI. and the statute 23 Hen. VI. c. 8. referred to by the learned Commentator in the preceding page; for that statute recites and ratifies the 14 Edw. III. c. 7. which provides only for the nomination of one person to fill the office when vacant; yet the former statute 9 Edw. II. st. 2. leaves the number indefinite, *viz.* sheriffs shall be assigned by the chancellor, &c. and if such a statute had passed in the course of those eleven years, it is probable that it would have been referred to by subsequent statutes. I should conceive that the practice originated from the consideration, that, as the king was to confirm the nomination by his patent, it was more convenient and respectful to present three to him than only one; and though this proceeding did not exactly correspond with the directions of the statute, yet it was not contrary to its spirit, or in strictness to its letter; and therefore the judges might, perhaps, think themselves warranted in saying, that the three persons were chosen according to the tenor of the statute.

" that, the next year, to eschew such inconveniences, the order " of the *statute* in this behalf made be observed." But [342] notwithstanding this unanimous resolution of all the judges of England, thus entered in the council book, and the statute 34 & 35 Hen. VIII. c. 26. § 61. which expressly recognises this to be the law of the land, some of our writers[i] have affirmed, that the king, by his prerogative, may name whom he pleases to be sheriff, whether chosen by the judges or no. This is grounded on a very particular case in the fifth year of queen Elizabeth, when, by reason of the plague, there was no Michaelmas term kept at Westminster: so that the judges could not meet there *in crastino animarum* to nominate the sheriffs: whereupon the queen named them herself, without such previous assembly, appointing for the most part one of the two remaining in the last year's list[k]. And this case, thus circumstanced, is the only authority in our books for the making these extraordinary sheriffs. It is true, the reporter adds, that it was held that the queen by her prerogative might make a sheriff without the election of the judges, *non obstante aliquo statuto in contrarium:* but the doctrine of *non obstante's* which sets the prerogative above the laws, was effectually demolished by the bill of rights at the revolution, and abdicated Westminster-hall when king James abdicated the kingdom. However, it must be acknowledged, that the practice of occasionally naming what are called pocket-sheriffs, by the sole authority of the crown, hath uniformly continued to the reign of his present majesty; in which, I believe, few (if any) compulsory instances have occurred (6).

i Jenkins. 229. k Dyer. 225.

(6) When the king appoints a person sheriff, who is not one of the three nominated in the exchequer, he is called a pocket-sheriff. It is probable, that no compulsory instance of the appointment of a pocket-sheriff ever occurred; and the unanimous opinion of the judges, preserved in the record cited by the learned Commentator from 2 Inst. 559. precludes the possibility of such a case. This is an ungracious prerogative; and whenever it is exercised, unless the occasion is manifest, the whole administration of justice throughout one county for a twelve-

Sheriffs, by virtue of several old statutes, are to continue in their office no longer than one year: and yet it hath been said[l] that a sheriff may be appointed *durante bene placito*, or during the king's pleasure; and so is the form of the royal writ[m]. Therefore, till a new sheriff be named, his office cannot be determined, unless by his own death, or the demise of the king; in which last case it was usual for the successor to send a new writ to the old sheriff[n]: but now by statute 1 Ann. st. 1. c. 8. all officers appointed by the preceding king may hold their offices, for six months after the king's [343] demise, unless sooner displaced by the successor. We may farther observe, that by statute 1 Ric. II. c. 11. no man that has served the office of sheriff for one year, can be compelled to serve the same again within three years after (7).

We shall find it is of the utmost importance to have the sheriff appointed according to law, when we consider his power and duty. These are either as a judge, as the keeper of the king's peace, as a ministerial officer of the superior courts of justice, or as the king's bailiff.

In his judicial capacity he is to hear and determine all causes of forty shillings value and under, in his county court, of which more in its proper place; and he has also a judicial power in divers other civil cases[o]. He is likewise to decide the elections of knights of the shire, (subject to the control of the house of commons,) of coroners, and of verderors; to judge of the qualification of voters, and to return such as he shall determine to be duly elected.

As the keeper of the king's peace, both by common law and special commission, he is the first man in the county, and

l 4 Rep. 32. m Dalt. of sheriffs. 8. n Dalt. 7. o Ibid. c. 4.

month, if not corrupted, is certainly suspected. The cause ought to be urgent or inevitable, when recourse is had to this prerogative.

(7) If there be other sufficient within the county. Until a different regulation was made by 8 Eliz. c. 16. in a great many instances two counties had one and the same sheriff: this is still the case in the counties of Cambridge and Huntingdon.

superior in rank to any nobleman therein, during his office[p]. He may apprehend, and commit to prison, all persons who break the peace, or attempt to break it; and may bind any one in a recognizance to keep the king's peace. He may, and is bound *ex officio* to pursue, and take all traitors, murderers, felons, and other misdoers, and commit them to gaol for safe custody. He is also to defend his county against any of the king's enemies when they come into the land: and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him; which is called the *posse comitatus*, or power of the county[q]: and this summons every person above fifteen years old, and under the degree of a peer, is bound to attend upon [344] warning[r], under pain of fine and imprisonment[s]. But though the sheriff is thus the principal conservator of the peace in his county, yet by the express directions of the great charter[t], he, together with the constable, coroner, and certain other officers of the king, are forbidden to hold any pleas of the crown, or, in other words, to try any criminal offence. For it would be highly unbecoming, that the executioners of justice should be also the judges; should impose, as well as levy, fines and amercements; should one day condemn a man to death, and personally execute him the next. Neither may he act as an ordinary justice of the peace during the time of his office[u]: for this would be equally inconsistent; he being in many respects the servant of the justices.

In his ministerial capacity the sheriff is bound to execute all process issuing from the king's courts of justice. In the commencement of civil causes, he is to serve the writ, to arrest, and to take bail; when the cause comes to trial, he must summon and return the jury; when it is determined, he must see the judgment of the court carried into execution. In criminal matters, he also arrests and imprisons, he re-

p 1 Roll. Rep. 237.
q Dalt. c. 95.
r Lamb. Eiren. 315.
s Stat. 2 Hen. V. c. 8.
t cap. 17.
u Stat. 1 Mar. st. 2. c. 8.

turns the jury, he has the custody of the delinquent, and he executes the sentence of the court, though it extend to death itself.

As the king's bailiff, it is his business to preserve the rights of the king within his bailiwick; for so his county is frequently called in the writs; a word introduced by the princes of the Norman line, in imitation of the French, whose territory is divided into bailiwicks, as that of England into counties [w]. He must seise to the king's use all lands devolved to the crown by attainder or escheat; must levy all fines and forfeitures; must seise and keep all waifs, wrecks, estrays, and the like, unless they be granted to some subject; and must also collect the king's rents within his bailiwick, if commanded by process from the exchequer [x].

To execute these various offices, the sheriff has [345] under him many inferior officers; an under-sheriff, bailiffs, and gaolers; who must neither buy, sell, nor farm their offices, on forfeiture of 500*l*. [y]

The under-sheriff usually performs all the duties of the office; a very few only excepted, where the personal presence of the high-sheriff is necessary. But no under-sheriff shall abide in his office above one year [z]; and if he does, by statute 23 Hen. VI. c. 8. he forfeits 200*l*. a very large penalty in those early days. And no under-sheriff or sheriff's officer shall practise as an attorney, during the time he continues in such office [a]: for this would be a great inlet to partiality and oppression. But these salutary regulations are shamefully evaded, by practising in the names of other attorneys, and putting in sham deputies by way of nominal under-sheriffs: by reason of which, says Dalton [b], the under-sheriffs and bailiffs do grow so cunning in their several places, that they are able to deceive, and it may well be feared that

w Fortesc. de L. L. c. 24.
x Dalt. c. 9.
y Stat. 3 Geo. I. c. 15.
z Stat. 42 Edw. III. c. 9.
a Stat. 1 Hen. V. c. 4.
b of sheriffs, c. 115.

many of them do deceive, both the king, the high-sheriff, and the county.

BAILIFFS, or sheriff's officers, are either bailiffs of hundreds, or special bailiffs. Bailiffs of hundreds are officers appointed over those respective districts by the sheriffs, to collect fines therein; to summon juries; to attend the judges and justices at the assizes, and quarter sessions; and also to execute writs and process in the several hundreds. But, as these are generally plain men, and not thoroughly skilful in this latter part of their office, that of serving writs, and making arrests and executions, it is now usual to join special bailiffs with them; who are generally mean persons, employed by the sheriffs on account only of their adroitness and dexterity in hunting and seising their prey. The [346] sheriff being answerable for the misdemesnors of these bailiffs, they are therefore usually bound in an obligation with sureties for the due execution of their office, and thence are called bound-bailiffs; which the common people have corrupted into a much more homely appellation.

GAOLERS are also the servants of the sheriff, and he must be responsible for their conduct. Their business is to keep safely all such persons as are committed to them by lawful warrant: and, if they suffer any such to escape, the sheriff shall answer it to the king, if it be a criminal matter; or, in a civil case, to the party injured[c]. And to this end the sheriff must[d] have lands sufficient within the county to answer the king and his people (8). The abuses of gaolers and

c Dalt. c. 118. 4 Rep. 34. 4 Edw. III. c. 9. 5 Edw. III. c. 4. 13 and 14 Car. II. c. 21. sec. 7.
d Stat. 9 Edw. II. st. 2. 2 Edw. III. c. 4.

(8) This is the only qualification required from a sheriff. That it was the intention of our ancestors that the lands of a sheriff should be considerable, abundantly appears from their having this provision so frequently repeated, and at the same time that they obtained a confirmation of *magna charta* and their most valuable liberties. As the sheriff, both in criminal and civil cases, may have the custody of men of the greatest property in the country, his own estate ought certainly to be large, that

sheriff's officers, towards the unfortunate persons in their custody, are well restrained and guarded against by statute 32 Geo. II. c. 28. and by statute 14 Geo. III. c. 59. provisions are made for better preserving the health of prisoners, and preventing the gaol distemper (9).

THE vast expense, which custom had introduced in serving the office of high-sheriff, was grown such a burthen to the subject, that it was enacted, by statute 13 & 14 Car. II. c. 21. that no sheriff (except of London, Westmorland, and towns which are counties of themselves) should keep any table at the assizes, except for his own family, or give any presents to the judges or their servants, or have more than forty men in livery: yet, for the sake of safety and decency, he may not have less than twenty men in England, and twelve in Wales; upon forfeiture, in any of these cases, of 200*l*.

II. THE coroner's is also a very ancient office at the common law. He is called coroner, *coronator*, because he hath principally to do with pleas of the crown, or such wherein the king is more immediately concerned[e]. And in this light the lord chief justice of the king's bench is the principal coroner in the kingdom, and may (if he pleases) exercise

e 2 Inst. 31. 4 Inst. 271.

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he may be above all temptation to permit them to escape, or to join them in their flight. In ancient times this office was frequently executed by the nobility and persons of the highest rank in the kingdom. *Eligebantur olim ad hoc officium potentissimi sæpenumero totius regni proceres, barones, comites, duces, interdum et regum filii.* Spel. Gloss. *Vicecom.* Bishops also were not unfrequently sheriffs. Richard duke of Gloucester (afterwards Richard the third) was sheriff of Cumberland five years together. (*Burn. Hist. Cumb.* 570.) It does not appear that there is any express law to exclude the nobility from the execution of this office, though it has long been appropriated to commoners.

(9) By statute 24 Geo. III. sess. 2. c. 54. sect. 22. no gaoler is to suffer tippling or gaming in the prison, or to sell any liquors therein, under the penalty of 10*l*. to be recovered by distress upon conviction.

the jurisdiction of a coroner in any part of the realm[f]. But there are also particular coroners for every county [347] of England; usually four, but sometimes six, and sometimes fewer[g]. This officer[h] is of equal antiquity with the sheriff; and was ordained together with him to keep the peace, when the earls gave up the wardship of the county.

He is still chosen by all the freeholders in the county court; as by the policy of our ancient laws the sheriffs, and conservators of the peace, and all other officers were, who were concerned in matters that affected the liberty of the people[i]; and as verderors of the forest still are, whose business it is to stand between the prerogative and the subject in the execution of the forest laws. For this purpose there is a writ at common law *de coronatore eligendo*[k]: in which it is expressly commanded the sheriff, "*quod talem eligi faciat, qui* "*melius et sciat, et velit, et possit, officio illi intendere.*" And, in order to effect this the more surely, it was enacted by the statute[l] of Westm. 1. that none but lawful and discreet knights should be chosen; and there was an instance in the 5 Edw. III. of a man being removed from this office, because he was only a merchant[m] (10). But it seems it it is now sufficient if a man hath lands enough to be made a

f 4 Rep. 57.
g F. N. B. 163.
h Mirror. c. 1. sec. 3.
i 2 Inst. 558.
k F. N. B. 163.
l 3 Edw. I. c. 10.
m 2 Inst. 32.

(10) That this was an office of high dignity in ancient times, appears from Chaucer's description of the Frankelein:

At sessions ther was he lord and sire,
Ful often time he was knight of the shire,
A shereve hadde ben, and a coronour,
Was no wher swiche a worthy vavasour.

Selden, tit. hon. 2. c. 5. s. 4. observes, that some copies have it *coronour*; others *countour*. But the office of an accountant is perfectly inconsistent with the character described, unless a countour signified an escheator.

knight (11), whether he be really knighted or not[n]: for the coroner ought to have an estate sufficient to maintain the dignity of his office, and answer any fines that may be set upon him for his misbehaviour[o]; and if he hath not enough to answer, his fine shall be levied on the county, as the punishment for electing an insufficient officer[p]. Now, indeed, through the culpable neglect of gentlemen of property, this office has been suffered to fall into disrepute, and get into low and indigent hands: so that, although formerly no coroners would condescend to be paid for serving their country, and they were by the aforesaid statute of Westm. 1. expressly forbidden to take a reward, under pain of [348] a great forfeiture to the king; yet for many years past they have only desired to be chosen for the sake of their perquisites: being allowed fees for their attendance by the statute 3 Hen. VII. c. 1. which sir Edward Coke complains of heavily[q]; though since his time those fees have been much enlarged[r].

THE coroner is chosen for life: but may be removed, either by being made sheriff, or chosen verderor, which are offices incompatible with the other; or by the king's writ *de coronatore exonerando*, for a cause to be therein assigned, as that he is engaged in other business, is incapacitated by years or sickness, hath not a sufficient estate in the county, or lives in an inconvenient part of it[s]. And by the statute 25 Geo. II. c. 29. extortion, neglect, or misbehaviour, are also made causes of removal.

THE office and power of a coroner are also, like those of the sheriff, either judicial or ministerial; but principally judicial. This is in great measure ascertained by statute 4 Edw. I. *de officio coronatoris;* and consists, first, in inquiring, when any person is slain, or dies suddenly, or in prison, concerning

n F. N. B. 163, 164.
o Ibid.
p Mirr. c. 1. sec. 3. 2 Inst. 175.
q 2 Inst. 210.
r Stat. 25 Geo. II. c. 29.
s F. N. B. 163, 164.

(11) Which by the *statutum de militibus*, 1 Edw. II. were lands to the amount of 20*l. per annum*.

the manner of his death. And this must be "*super visum* "*corporis*[s];" for, if the body be not found, the coroner cannot sit[t]. He must also sit at the very place where the death happened: and his inquiry is made by a jury from four, five, or six of the neighbouring towns, over whom he is to preside. If any be found guilty by this inquest of murder or other homicide, he is to commit them to prison for farther trial, and is also to inquire concerning their lands, goods and chattels, which are forfeited thereby: but, whether it be homicide or not, he must inquire whether any deodand has accrued to the king, or the lord of the franchise, by this death: and [349] must certify the whole of this inquisition (under his own seal and the seals of the jurors[u]) together with the evidence thereon, to the court of king's bench, or the next assizes (12). Another branch of his office is to inquire concerning shipwrecks; and certify whether wreck or not, and who is in possession of the goods. Concerning treasure-trove, he is also to inquire who were the finders, and where it is, and whether any one be suspected of having found and concealed a treasure; "and that may be well perceived, (saith the "old statute of Edw. I.) where one liveth riotously, haunting "taverns, and hath done so of long time:" whereupon he might be attached, and held to bail, upon this suspicion only.

THE ministerial office of the coroner is only as the sheriff's substitute. For when just exception can be taken to the sheriff, for suspicion of partiality, (as that he is interested in the suit, or of kindred to either plaintiff or defendant,) the process must then be awarded to the coroner, instead of the sheriff, for execution of the king's writs[v].

s 4 Inst. 271.

t Thus, in the Gothic constitution, before any fine was payable by the neighbourhood, for the slaughter of a man therein, "de cor- "pore delicti constare oportebat; i. e. non "tam fuisse aliquem in territorio isto mor- "tuum inventum quam vulneratum et cae- "sum. Potest enim homo etiam ex alia causa "subito mori." Stiernhook de jure Gothor. l. 3. c. 4.

u Stat. 33 Hen. VIII. c. 12. 1 and 2 P. and M. c. 13. 2 West. Symbol. sec. 310. Crompt. 264. Tremain. P. C. 621.

v 4 Inst. 271.

(12) The coroner's inquest must be returned upon parchment, or it cannot be received as a record. I have known a judge fine a coroner for returning his inquest upon paper.

III. The next species of subordinate magistrates, whom I am to consider, are justices of the peace; the principal of whom is the *custos rotulorum*, or keeper of the records of the county. The common law hath ever had a special care and regard for the conservation of the peace; for peace is the very end and foundation of civil society. And therefore, before the present constitution of justices was invented, there were peculiar officers appointed by the common law for the maintenance of the public peace. Of these some had, and still have, this power annexed to other offices which they hold; others had it merely by itself, and were thence named *custodes* or *conservatores pacis*. Those that were so *virtute officii* still continue: but the latter sort are superseded by the modern justices.

The king's majesty [w] is, by his office and dignity royal, the principal conservator of the peace within all his dominions; and may give authority to any other to [350] see the peace kept, and to punish such as break it: hence it is usually called the king's peace. The lord chancellor or keeper, the lord treasurer, the lord high steward of England, the lord mareschal, the lord high constable of England, (when any such officers are in being,) and all the justices of the court of king's bench, (by virtue of their offices,) and the master of the rolls, (by prescription,) are general conservators of the peace throughout the whole kingdom, and may commit all breakers of it, or bind them in recognizances to keep it [x]: the other judges are only so in their own courts. The coroner is also a conservator of the peace within his own county [y]; as is also the sheriff [z]; and both of them may take a recognizance or security for the peace. Constables, tythingmen, and the like, are also conservators of the peace within their own jurisdictions; and may apprehend all breakers of the peace and commit them, till they find sureties for their keeping it [a].

w Lambard. Eirenarch. 12.
x Lamb. 13.
y Britton. 3.
z F. N. B. 8 b.
aa Lamb. 14.

THOSE that were, without any office, simply and merely conservators of the peace, either claimed that power by prescription [b]; or were bound to exercise it by the tenure of their lands [c]; or, lastly, were chosen by the freeholders in full county court before the sheriff; the writ for their election directing them to be chosen "*de probioribus et potentioribus comitatus sui in custodes pacis* [d]." But when queen Isabel, the wife of Edward II, had contrived to depose her husband by a forced resignation of the crown, and had set up his son Edward III. in his place; this, being a thing then without example in England, it was feared would much alarm the people: especially as the old king was living, though hurried about from castle to castle; till at last he met with an untimely death. To prevent therefore any risings, or other disturbance of the peace, the new king sent writs to all the sheriffs in England, the form of [351] which is preserved by Thomas Walsingham [e], giving a plausible account of the manner of his obtaining the crown; to wit, that it was done *ipsius patris beneplacito:* and withal commanding each sheriff that the peace be kept throughout his bailiwick, on pain and peril of disinheritance and loss of life and limb. And in a few weeks after the date of these writs, it was ordained in parliament [f], that, for the better maintaining and keeping of the peace in every county, good men and lawful, which were no maintainers of evil, or barretors in the country, should be *assigned* to keep the peace. And in this manner, and upon this occasion, was the election of the conservators of the peace taken from the people, and given to the king [g]; this assignment being construed to be by the king's commission [h]. But still they were only called conservators, wardens, or keepers of the peace, till the statute 34 Edward III. c. 1. gave them the power of trying felonies; and then they acquired the more honorable appellation of justices [i].

b Lamb. 15.
c Ibid. 17.
d Ibid. 16.
e Hist. A. D. 1327.
f Stat. 1 Edw. III. c. 16.
g Lamb. 20.
h Stat. 4 Edw. III. c. 2. 18 Edw. III. st. 2. c. 2.
i Lamb. 23.

THESE justices are appointed by the king's special commission under the great seal, the form of which was settled by all the judges, *A. D.* 1590[j]. This appoints them all[k], jointly and severally, to keep the peace, and any two or more of them to inquire of and determine felonies and other misdemesnors: in which number some particular justices, or one of them, are directed to be always included, and no business to be done without their presence; the words of the commission running thus, "*quorum aliquem vestrum, A. B. C. D. &c. unum esse volumus;*" whence the persons so named are usually called justices of the *quorum*. And formerly it was customary to appoint only a select number of justices, eminent for their skill and discretion, to be of the *quorum*; but now the practice is to advance almost all of them to that dignity, naming them all over again in the *quorum* clause, except perhaps only some one inconsiderable person for the sake of propriety: and no exception is now allowable, for not expressing in the form of warrants, *&c.* [352] that the justice who issued them is of the *quorum*[l].

When any justice intends to act under this commission, he sues out a writ of *dedimus potestatem*, from the clerk of the crown in chancery, empowering certain persons therein named to administer the usual oaths to him; which done, he is at liberty to act.

TOUCHING the number and qualifications of these justices; it was ordained by statute 18 Edw. III. c. 2. that *two* or *three* of the best reputation in each county, shall be assigned to be keepers of the peace. But these being found rather too few for that purpose, it was provided by statute 34 Edw. III. c. 1. that one lord, and three, or four, of the most worthy men in the county, with some learned in the law, shall be made justices in every county. But afterwards the number of justices, through the ambition of private persons, became so large, that it was thought necessary by statute 12 Ric. II.

j Lamb. 43.

k See the form itself, Lamb. 35. Burn. tit. Justices, sec. 1.

l Stat. 26 Geo. II. c. 27. See also stat. 7 Geo. III. c. 21.

c. 10. and 14 Ric. II. c. 11. to restrain them at first to six, and afterwards to eight only. But this rule is now disregarded, and the cause seems to be, (as Lambard observed long ago [m],) that the growing number of statute laws, committed from time to time to the charge of justices of the peace, have occasioned also (and very reasonably) their increase to a larger number. And, as to their qualifications, the statutes just cited direct them to be of the best reputation, and most worthy men in the county: and the statute 13 Ric. II. c. 7. orders them to be of the most sufficient knights, esquires, and gentlemen of the law. Also by statute 2 Hen. V. st. 1. c. 4. and st. 2. c. 1. they must be resident in their several counties. And because, contrary to these statutes, men of small substance had crept into the commission, whose poverty made them both covetous and contemptible, it was enacted by statute 18 Hen. VI. c. 11. that no justice should be put in commission, if he had not lands to the value of 20*l. per annum*. And, the rate of money being greatly altered since that time, it is now enacted by statute
[353] 5 Geo. II. c. 18. that every justice, except as is therein excepted, shall have 100*l. per annum* clear of all deductions (12); and, if he acts without such qualification, he shall forfeit 100*l.* This qualification [n] is almost an equivalent to the 20*l. per annum* required in Henry the sixth's time: and of this [o] the justice must now make oath. Also it

m Lamb. 34.
n See bishop Fleetwood's calculations in his *chronicon pretiosum*.
o Stat. 18 Geo. II. c. 20.

(12) The 18 Geo. II. c. 20. is the last statute which prescribes the qualifications of justices of the peace. This clear estate of 100*l. per annum*, may consist either in freehold or copyhold, an estate of inheritance or for life, or even in a term for 21 years. A reversion or remainder after one or more lives of the value of 300*l. per annum* is also a qualification. But this does not extend to corporation justices, or to the eldest sons of peers, and of gentlemen qualified to be knights of shires, the officers of the board of green cloth, principal officers of the navy, under-secretaries of state, heads of colleges, or to the mayors of Cambridge and Oxford, all of whom may act without any qualification by estate.

is provided by the act 5 Geo. II. that no practising attorney, solicitor, or proctor, shall be capable of acting as a justice of the peace (13).

As the office of these justices is conferred by the king, so it subsists only during his pleasure; and is determinable, 1. By the demise of the crown; that is, in six months after[p]. But if the same justice is put in commission by the successor, he shall not be obliged to sue out a new *dedimus*, or to swear to his qualification afresh[q]: nor, by reason of any new commission, to take the oaths more than once in the same reign[r]. 2. By express writ under the great seal[s], discharging any particular person from being any longer justice. 3. By superseding the commission by writ of *supersedeas*, which suspends the power of all the justices, but does not totally destroy it; seeing it may be revived again by another writ, called a *procedendo*. 4. By a new commission, which virtually, though silently, discharges all the former justices that are not included therein; for two commissions cannot subsist at once. 5. By accession of the office of sheriff or coroner[t] (14). Formerly it was thought, that if a man was named in any commission of the peace, and had afterwards a new dignity conferred upon him, that this determined his office; he no longer answering the description of the commission: but now[u] it is provided, that notwithstanding a new title of dignity, the justice on whom it is conferred shall still continue a justice.

THE power, office, and duty of a justice of the peace depend on his commission, and on the several statutes which

p Stat. 1 Ann. c. 8.
q Stat. 1 Geo. III. c. 13.
r Stat. 7 Geo. III. c. 9.
s Lamb. 67.
t Stat. 1 Mar. st. 1. c. 8.
u Stat. 1 Edw. VI. c. 7.

(13) For any county.

(14) A sheriff cannot act as a justice during the year of his office; but neither the statute referred to, nor I apprehend any other statute, disqualifies a coroner from acting as a justice of the peace; nor do the two offices in their nature seem incompatible.

have created objects of his jurisdiction. His commission, first, empowers him singly to conserve the peace; and thereby gives him all the power of the ancient conservators at the common law, in suppressing riots and affrays, in taking securities for the peace, and in apprehending and committing felons and other inferior criminals. It also empowers any two or more to hear and determine all felonies and other offences; which is the ground of their jurisdiction at sessions (15), of which more will be said in its proper place. And as to the powers given to one, two (16), or more justices by the several statutes, which from time to time have heaped upon them such an infinite variety of business, that few care to undertake, and fewer understand, the office; they are such and of so great importance to the public, that the country is greatly obliged to any worthy magistrate, that without sinister views of his own will engage in this troublesome service. And therefore, if a well-meaning justice makes any undesigned slip in his practice, great lenity and indulgence are shewn to him in the courts of law; and there are many statutes made to protect him in the upright discharge of his office[w]; which, among other privileges, prohibit such justices from being sued for any oversights without notice

[w] Stat. 7 Jac. I. c. 5. 21 Jac. I. c. 12. 24 Geo. II. c. 44.

(15) The sessions cannot be held without the presence of two justices.

(16) Where a statute requires any act to be done by two justices, it is in general an established rule, that, if the act is of a judicial nature, or is the result of discretion, the two justices must be present to concur and join in it, otherwise it will be void; as in orders of removal and filiation, the appointment of overseers, and the allowance of the indenture of a parish apprentice; but where the act is merely ministerial, they may act separately, as in the allowance of a poor rate. This is the only act of two justices, which has yet been construed to be ministerial; and the propriety of this construction has been justly questioned. 3 *T. Rep.* 380.

But it has been held, that an order of removal signed by two justices separately is not void but voidable, and can only be avoided by an appeal to the sessions. 4 *T. R.* 596.

beforehand; and stop all suits begun, on tender made of sufficient amends (17). But, on the other hand, any malicious or tyrannical abuse of their office is usually severely

(17) It behoves every magistrate to be acquainted with the law and the extent of his authority, and he may be compelled to make an adequate compensation to those who suffer by his ignorance or inadvertence: but to protect him from being harassed by vexatious actions, it is provided, that he shall have notice of any action commenced against him, and the cause of it, one month before the writ is sued out, or a copy of it served upon him, by a writing from the attorney, of the party, who shall indorse upon it his name and residence. The notice must specify the precise writ or process intended to be sued out. And if the notice calls it *an actian on the case*, it will not be sufficient if *an action of trespass* is brought. 7 *T. R.* 631. The magistrate may afterwards tender amends, and plead such tender with the general issue and any other plea. And if the sum tendered be thought sufficient by the jury, he shall obtain a verdict with costs. This action must be commenced within six months after the injury complained of. 24 *Geo. II. c.* 44.

If a magistrate abuses the authority reposed in him by the law, in order to gratify his malice, or promote his private interest or ambition, he may be punished also criminally by indictment or information. But the court of king's bench have frequently declared, that though a justice of peace should act illegally, yet, if he has acted honestly and candidly, without any bad view or ill intention whatsoever, the court will never punish him by the extraordinary mode of an information, but will leave the party complaining to the ordinary method of prosecution by action or indictment. 2 *Bur.* 1162. And in no case will the court grant an information unless an application for it is made within the second term after the offence committed, and notice of the application be previously given to the justice, and unless the party injured will undertake to bring no action. And if the party proceeds both by action and indictment, the attorney general will grant a *noli prosequi* to the indictment. Indeed, where a justice has committed an involuntary error, without any corrupt motive or intention, it may be questioned whether it is an indictable offence; for the act in that case is either null and void, or the justice is answerable in damages for all the consequences of it. It is the object of all punishment to prevent a repetition of the act; and it it would be absurd to punish a man for an involuntary act, or for that which he has neither power nor will to avoid.

punished; and all persons who recover a verdict against a justice, for any wilful or malicious injury, are entitled to double costs (18).

It is impossible upon our present plan to enter minutely into the particulars of the accumulated authority, thus committed to the charge of these magistrates. I must therefore refer myself at present to such subsequent parts of these commentaries, as will in their turns comprise almost every object of the justices' jurisdiction: and in the mean time recommend to the student the perusal of Mr. Lambard's *eirenarcha*, and Dr. Burn's *justice of the peace*; wherein he will find every thing relative to this subject, both in ancient and modern practice, collected with great care and accuracy, and disposed in a most clear and judicious method.

[355] I shall next consider some officers of lower rank than those which have gone before, and of more confined jurisdiction; but still such as are universally in use through every part of the kingdom.

IV. Fourthly, then, of the constable. The word *constable* is frequently said to be derived from the Saxon, koningꝑepel, and to signify the support of the king. But as we borrowed the name as well as the office of constable from the French, I am rather inclined to deduce it, with sir Henry Spelman and Dr. Cowel, from that language: wherein it is plainly derived from the Latin *comes stabuli*, an officer well known in the empire; so called, because, like the great constable of France, as well as the lord high constable of England, he was to regulate all matters of chivalry, tilts, tournaments, and feats of arms, which were performed on horseback (19). This great office of lord high constable hath been disused

(18) That is, where the judge certifies in court that the injury was wilful and malicious.

(19) We may form a judgment of his power, and the condition of the people of this country in the fifteenth century, from the following

in England, except only upon great and solemn occasions, as the king's coronation and the like, ever since the attainder of Stafford duke of Buckingham under king Henry VIII; as in France it was suppressed about a century after by an edict of Louis XIII[x]: but from his office, says Lambard[y], this lower constableship was at first drawn and fetched, and is as it were a very finger of that hand. For the statute of Winchester[z], which first appoints them, directs that, for the better keeping of the peace, two constables in every hundred and franchise shall inspect all matters relating to *arms* and *armour*.

CONSTABLES are of two sorts, high constables, and petty constables. The former were first ordained by the statute of Winchester, as before mentioned; are appointed at the court leets of the franchise or hundred over which they preside, or, in default of that, by the justices at their quarter sessions; and are removable by the same authority [356] that appoints them[a]. The petty constables are inferior officers in every town and parish, subordinate to the high constable of the hundred, first instituted about the reign of Edw. III[b]. These petty constables have two offices united in them; the one ancient, the other modern. Their ancient office is that of headborough, tithing-man, or borsholder; of whom we formerly spoke[c], and who are as ancient as the time of king Alfred: their more modern office is that of constable merely; which was appointed (as was observed) so lately as the reign of Edward III, in order to assist the high

x Philip's life of Pole. ii. 111.
y of constables. 5.
z 13 Edw. I. c. 6.
a Salk. 150.
b Spelm. Gloss. 148.
c page 115.

clause in a commission in the 7 Edw. IV. to Richard earl Rivers; *Plenam potestatem et auctoritatem damus et committimus ad cognoscendum et procedendum in omnibus et singulis causis et negotiis de et super crimine lesæ majestatis, seu ipsius occasione, cæteriaque causis quibuscunque, summariè et de plano, sine strepitu et figur â judicii, solâ facti veritate inspectâ.* Rym. Foed. tom. xi. p. 582.

constable[d]. And in general the ancient headboroughs, tithing-men, and borsholders, were made use of to serve as petty constables; though not so generally, but that in many places they still continue distinct officers from the constable. They are all chosen by the jury at the court leet; or if no court leet be held, are appointed by two justices of the peace[e].

THE general duty of all constables, both high and petty, as well as of the other officers, is to keep the king's peace in their several districts; and to that purpose they are armed with very large powers, of arresting, and imprisoning, of breaking open houses, and the like: of the extent of which powers, considering what manner of men are for the most part put into these offices, it is perhaps very well that they are generally kept in ignorance (20). One of their principal duties, arising from the statute of Winchester, which appoints them, is to keep watch and ward in their respective jurisdictions. Ward, guard, or *custodia*, is chiefly applied to the day time, in order to apprehend rioters, and robbers on the highway; the manner of doing which is left to the discretion of the justices of the peace and the constable[f]: the hundred being however answerable for all robberies committed therein, by day light, for having kept negligent guard. Watch is properly applicable to the night only, (being called among our Teutonic ancestors *wacht* or *wacta*[g]) and it begins at [357] the time when ward ends, and ends when that begins: for, by the statute of Winchester, in walled towns the gates shall be closed from sunsetting to sunrising, and watch shall be kept in every borough and town, especially in

d Lamb. 9.
e Stat. 14 and 15 Car. II. c. 12.
f Dalt. just. c. 104.
g Excubias et explorationes quas wactas vocant. Capitular. Hludov. Pii, cap. 1. A. D. 815.

(20) If their powers are dangerous, they ought to be curtailed by the legislature; but surely every officer ought to know the extent of his duty and authority.

the summer season, to apprehend all rogues, vagabonds, and night-walkers, and make them give an account of themselves. The constable may appoint watchmen, at his discretion, regulated by the custom of the place; and these, being his deputies, have for the time being the authority of their principal. But, with regard to the infinite number of other minute duties, that are laid upon constables by a diversity of statutes, I must again refer to Mr. Lambard and Dr. Burn; in whose compilations may be also seen, what powers and duties belong to the constable or tithing-man indifferently, and what to the constable only: for the constable may do whatever the tithing-man may; but it does not hold *e converso*, the tithing-man not having an equal power with the constable.

V. We are next to consider the surveyors of the highways. Every parish is bound of common right to keep the high roads, that go through it, in good and sufficient repair; unless by reason of the tenure of lands, or otherwise, this care is consigned to some particular private person. From this burden no man was exempt by our ancient laws, whatever other immunities he might enjoy: this being part of the *trinoda necessitas*, to which every man's estate was subject; viz. *expeditio contra hostem, arcium constructio, et pontium reparatio*. For, though the reparation of bridges only is expressed, yet that of roads also must be understood; as in the Roman law, *ad instructiones reparationesque itinerum et pontium, nullum genus hominum nulliusque dignitatis ac venerationis meritis, cessare oportet*[h]. And indeed now, for the most part, the care of the roads only seems to be left to parishes; that of bridges being in great measure devolved upon the county at large, by statute 22 Hen. VIII. c. 5. If the parish neglected these repairs, they might formerly, as they may still, be indicted for such their [358] neglect: but it was not then incumbent on any particular officer to call the parish together, and set them upon

h C. 11. 74. 4

this work; for which reason by the statute 2 & 3 Ph. & M. c. 8. surveyors of the highways were ordered to be chosen in every parish [1].

These surveyors were originally, according to the statute of Philip and Mary, to be appointed by the constable and church-wardens of the parish; but now they are constituted by two neighbouring justices, out of such inhabitants or others, as are described in statute 13 Geo. III. c. 78. and may have salaries allotted them for their trouble.

Their office and duty consists in putting in execution a variety of laws for the repairs of the public highways; that is, of ways leading from one town to another: all which are now reduced into one act by statute 13 Geo. III. c. 78. which enacts, 1. That they may remove all annoyances in the highways, or give notice to the owner to remove them; who is liable to penalties on non-compliance. 2. They are to call together all the inhabitants and occupiers of lands, tenements, and hereditaments within the parish, six days in every year, to labor in fetching materials or repairing the highways: all persons keeping draughts (of three horses, &c.) or occupying lands, being obliged to send a team for every draught, and for every 50*l.* a year, which they keep or occupy; persons keeping less than a draught, or occupying less than 50*l.* a year, to contribute in a less proportion; and all other persons chargeable, between the ages of eighteen and sixty-five, to work or find a laborer. But they may compound with the surveyors, at certain easy rates established by the act. And every cartway leading to any market-town must be made twenty feet wide at the least, if the fences will permit;

[1] This office, Mr. Dalton (just. cap. 50.) says, exactly answers that of the curatores viarum of the Romans; but it should seem that theirs was an office of rather more dignity and authority than ours; not only from comparing the method of making and mending the Roman ways with those of our country parishes; but also because one Thermus, who was the curator of the Flaminian way, was candidate for the consulship with Julius Cæsar. (Cic. ad Attic. l. 1. ep. 1.)

and may be increased by two justices, at the expense of the parish, to the breadth of thirty feet (21). 3. The surveyors may lay out their own money in purchasing materials for

(21) Two justices, where they think it will render the road more commodious, may order it to be diverted; the power to enlarge does not extend to pull down any building; or to take in the ground of any garden, park, paddock, court, or yard.

No tree or bush shall be permitted to grow in any highway, within fifteen feet from the centre of it, except for ornament or shelter to a house; and the owners of the adjoining lands may be compelled to cut their hedges, so as not to exclude the sun and wind from the highway. Fines awarded by the court for not repairing a highway, shall not be returned into the exchequer, but shall be applied to the repair of the highways as the court shall direct.

But the general highway act, the 13 Geo. III. and the subsequent regulations made by the 34 Geo. III. c. 74. are far too long to give an adequate representation of them in an abridgment. Those who are interested in the subject must consult the Statutes at Large, or the title, *Highway*, in Burn's Justice, where they are fully stated.

The 34 Geo. III. c. 74. has thrown the whole burden of the repair of the highways upon the occupiers of tenements, and by long and mysterious clauses has repealed those sections in the 13 Geo. III. c. 78. which provided that every man, not being the occupier of any tenement of 4*l*. a year between the ages of 18 and 60, and not being an apprentice or menial servant, should work personally six days yearly, or compound by paying two shillings. I know that many intelligent magistrates could not, at the first, comprehend this statute; but when the effect of it could not be disputed, still they could not believe that this had been the intention of the legislature. This statute gives a power to two justices to exempt the poor occupiers of tenements from the payment of assessments towards the highways. Why the payment of so small a tax as 2*s*. a year towards the repair of the roads upon every male inmate as before described, who could afford to pay it, was thrown upon the occupiers of land or tenements only, if the framers of it at the time actually understood the full operation of this statute, is to me wholly incomprehensible.

repairs, in erecting guide-posts, and making drains, and shall be reimbursed by a rate to be allowed at a special sessions. 4. In case the personal labor of the parish be not sufficient, the surveyors, with the consent of the quarter sessions, may levy a rate on the parish, in aid of the personal duty, not exceeding, in any one year, together with the other highway rates, the sum of 9*d.* in the pound; for the due application of which they are to account upon oath. As for turnpikes, which are now pretty generally introduced in aid of such rates, and the law relating to them, these depend principally on the particular powers granted in the several road acts, and upon some general provisions which are extended to all turnpike roads in the kingdom, by statute 13 Geo. III. c. 84. amended by many subsequent acts[k].

VI. I PROCEED therefore, lastly, to consider the overseers of the poor; their original, appointment, and duty.

THE poor of England, till the time of Hen. VIII, subsisted entirely upon private benevolence, and the charity of well disposed christians (22). For though it appears by the mirror[l], that by the common law the poor were to be "sustained by "parsons, rectors of the church, and the parishioners; so that

k Stat. 14 Geo. III. c. 14. 36. 57. 82. 16 Geo. III. c. 30. 18 Geo. III. c. 22.
l c. 1. sec. 3.

The preamble to the 34 Geo. III. c. 64. states that it frequently happens, that the boundaries of two parishes pass through the middle of a common highway, so that one side is situated in, and liable to be repaired by, one parish, and the other by the adjoining parish, which has been found to be inconvenient; it therefore enacts that two justices of the peace shall have power to divide such a road between the two parishes by a transverse line or boundary. And either parish discontented with that division may appeal to the quarter sessions, whose decision shall be final.

(22) The poor in Ireland, to this day, have no relief but from private charity. 2 *Ld. Mount.* 118.

" none of them die for default of sustenance;" and though by the statutes 12 Ric. II. c. 7. and 19 Hen. VII. c. 12. the poor are directed to abide in the cities or towns wherein they were born, or such wherein they had dwelt for three years, which seem to be the first rudiments of parish settlements,) yet till the statute 27 Hen. VIII. c. 25. I find no compulsory method chalked out for this purpose: but the poor seem to have been left to such relief as the humanity of their neighbours would afford them. The monasteries were, in particular, their principal resource; and, among other bad effects which attended the monastic institutions, it was not perhaps one of the least (though frequently esteemed quite otherwise) that they supported and fed a very numerous and very idle poor, whose sustenance depended upon what was daily distributed in alms at the gates of the religious houses. But, upon the total dissolution of these, the [360] inconvenience of thus encouraging the poor in habits of indolence and beggary was quickly felt throughout the kingdom: and abundance of statutes were made in the reign of king Henry the eighth and his children, for providing for the poor and impotent; which, the preambles to some of them recite, had of late years greatly increased. These poor were principally of two sorts: sick and impotent, and therefore unable to work; idle and sturdy, and therefore able, but not willing, to exercise an honest employment. To provide in some measure for both of these, in and about the metropolis, Edward the sixth founded three royal hospitals; Christ's and St. Thomas's, for the relief of the impotent through infancy or sickness; and Bridewell for the punishment and employment of the vigorous and idle. But these were far from being sufficient for the care of the poor throughout the kingdom at large: and therefore, after many other fruitless experiments, by statute 43 Eliz. c. 2. overseers of the poor were appointed in every parish.

By virtue of the statute last mentioned, these overseers are to be nominated yearly in Easter-week, or within one month

after, (though a subsequent nomination will be valid[m],) by two justices dwelling near the parish. They must be substantial householders, and so expressed to be in the appointment of the justices[n] (23).

THEIR office and duty, according to the same statute, are principally these: first, to raise competent sums for the necessary relief of the poor, impotent, old, blind, and such other, being poor and not able to work: and secondly, to provide work for such as are able, and cannot otherwise get employment: but this latter part of their duty, which according to the wise regulations of that salutary statute, should go hand in hand with the other, is now most shamefully neglected.

[36] However, for these joint purposes, they are empowered to make and levy rates upon the several inhabitants of the parish, by the same act of parliament; which has been farther explained and enforced by several subsequent statutes.

THE two great objects of this statute seem to have been, 1. To relieve the impotent poor, and them only. 2. To find employment for such as are able to work: and this principally by providing stocks of raw materials to be worked up at their separate homes, instead of accumulating all the poor in one common work-house; a practice which puts the sober and diligent upon a level (in point of their earnings) with

m Str. 1123. n 2 Lord Raym. 1394.

(23) It is declared by the statute, that the church-wardens of every parish shall be overseers of the poor; besides these the justices may appoint two, three, or four, but not more, of the inhabitants overseers for each parish. (1 *Burr.* 446.) But if a parish is divided into townships, and is so large, that some townships cannot reap the benefit intended by the 43 of Elizabeth, in that case, separate overseers may be appointed for such townships, under the 13 & 14 Car. II. c. 12. Wherever there is a constable, there is a township. 1 *T. R.* 374.

A woman may be appointed an overseer of the poor, if a substantial householder. 2 *T. R.* 395.

those who are dissolute and idle, depresses the laudable emulation of domestic industry and neatness, and destroys all endearing family connexions, the only felicity of the indigent. Whereas, if none were relieved but those who are incapable to get their livings, and that in proportion to their incapacity: if no children were removed from their parents, but such as are brought up in rags and idleness; and if every poor man and his family were regularly furnished with employment, and allowed the whole profits of their labor; a spirit of busy cheerfulness would soon diffuse itself through every cottage; work would become easy and habitual, when absolutely necessary for daily subsistence; and the peasant would go through his task without a murmur, if assured that he and his children (when incapable of work through infancy, age, or infirmity) would then, and then only, be entitled to support from his opulent neighbours.

THIS appears to have been the plan of the statute of queen Elizabeth; in which the only defect was confining the management of the poor to small, parochial districts; which are frequently incapable of furnishing proper work, or providing an able director. However, the laborious poor were then at liberty to seek employment wherever it was to be had: none being obliged to reside in the places of their settlement, but such as were unable or unwilling to work, and those places of settlement being only such where they were *born*, or had made their *abode*, originally for three years[o], and afterwards (in the case of vagabonds) for one year only[p]. [362]

AFTER the restoration a very different plan was adopted, which has rendered the employment of the poor more difficult, by authorizing the subdivision of parishes; has greatly increased their number, by confining them all to their respective districts, has given birth to the intricacy of our poor-laws, by multiplying and rendering more easy the methods of gaining settlements; and, in consequence, has created an in-

o Stat. 19 Hen. VII. c. 12. 1 Edw. VI. c. 3. 3 Edw. VI. c. 16. 14 Eliz. c. 5.
p Stat. 39 Eliz. c. 4.

finity of expensive law-suits between contending neighbourhoods, concerning those settlements and removals. By the statute 13 & 14 Car. II. c. 12. a legal settlement was declared to be gained by *birth*; or by *inhabitancy*, *apprenticeship*, or *service*, for forty days: within which period all intruders were made removeable from any parish by two justices of the peace, unless they settled in a tenement of the annual value of 10*l*. The frauds, naturally consequent upon this provision, which gave a settlement by so short a residence, produced the statute 1 Jac. II. c. 17. which directed *notice* in writing to be delivered to the parish officers, before a settlement could be gained by such residence. Subsequent provisions allowed other circumstances of notoriety to be equivalent to such notice given; and those circumstances have from time to time been altered, enlarged, or restrained, whenever the experience of new inconveniencies, arising daily from new regulations, suggested the necessity of a remedy. And the doctrine of *certificates* was invented, by way of counterpoise, to restrain a man and his family from acquiring a new settlement by any length of residence whatever, unless in two particular excepted cases; which makes parishes very cautious of giving such certificates, and of course confines the poor at home, where frequently no adequate employment can be had (24).

(24) By 13 and 14 Car. II. c. 12. all persons who are likely to become chargeable, unless they settle upon a tenement of the yearly value of 10*l*. may be removed to the places where they are legally settled. This statute was certainly a great infringement of *magna charta* and the liberty of the subject; as nothing can be more cruel or impolitic, than to prevent a person from residing in that situation where, by his industry and occupation, he can best procure a competent provision for himself and his family. To alleviate, in some degree, the hardship and inconvenience introduced by that statute, the legislature has provided by the 8 & 9 W. III. c. 30. that if the major part of the churchwardens and overseers of any parish or township will grant a certificate under their hands and seals, attested by two witnesses, and allowed and subscribed by two justices, acknowledging a person and his family therein specified, to have a legal settlement in their parish or township, and shall

THE law of settlements may be therefore now reduced to the following general heads; or, a settlement in a parish may

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direct it to some particular parish or township; such person, having delivered this certificate to the parish officers, where it is directed, then neither he nor his family are removable from thence till they are actually chargeable. 6 *T. R.* 552. But as the object of the certificate was to prevent him from bringing any incumbrance upon the parish where he is thus permitted to reside, by the 9 and 10 W. III. c. 11. he is restrained from gaining a settlement where he lives under the protection of the certificate by any means whatever, except by renting a tenement of the yearly value of 10*l.* and by a residence in the parish for forty days, or by executing an annual office. But besides these two cases mentioned in the act, it has been held, that a certificate person may gain a settlement by residing upon (or having in the parish where he resides) any estate whatever of his own, provided, if it has been actually purchased by him, he has *bonâ fide* paid 30*l.* for it. *Str.* 163. 1193. *Burr. S. C.* 220. A certificate is conclusive upon the parish granting it, with respect to the parish to which it is granted or first delivered; but it is not so with regard to other parishes; for though it will be *prima facie* evidence against the parish granting it, yet it may be repelled by other evidence; and they may be permitted to shew, that they gave it under a mistake, and in their own wrong. 4 *T. R.* 251.

A certificate extends to children born after it is granted, but not to the grand-children of the *pater-familias*. 4 *T. R.* 797.

But the object of granting certificates is now put an end to by the 35 Geo. III. c. 101. which enacts that no person shall be removed by an order of removal till he becomes actually chargeable. But every unmarried woman with child shall be deemed to be actually chargeable, and also all persons convicted of any felony, and rogues, vagabonds, and idle or disorderly persons, and persons of evil fame, or reputed thieves not giving a satisfactory account of themselves, may be removed, as if they were actually chargeable. And where a pauper is ordered to be removed by an order of removal, or a vagrant pass, in case of the sickness of the pauper, the justices making such an order may direct the execution of it to be suspended; and in the case of an order of removal, the expenses of the maintenance of the pauper during such suspension shall be borne by the parish to which the order of removal shall be made. And if an unmarried woman is delivered of a child during such suspension, it shall be settled in the parish which at the time of the birth was the legal settlement of the mother.

be acquired, 1. By *birth*; for, wherever a child is first known to be, that is always *prima facie* the place of settlement, until some other can be shewn[q]. This is also generally the place of settlement of a bastard child[r]; for a bastard having in the eye of the law no father, cannot be referred to *his* settlement, as other children may[s]. But, in legitimate children, though the place of birth be *prima facie* the settlement, yet it is not conclusively so; for there are, 2. Settlements by *parentage*, being the settlement of one's father or mother: all legitimate children being really settled in the parish where their parents are settled, until they get a new settlement for themselves[t] (25). A new settlement may be acquired several ways; as, 3. By *marriage*. For a woman, marrying a man that is settled in another parish, changes her own settlement; the law not permitting the separation of husband and wife[u]. But if the man has no settlement, her's is suspended during his life, if he remains in England, and is able to maintain her; but in his absence, or after his death, or during (perhaps) his inability, she may be removed to her old settlement[v] (26). The other methods of acquiring settlements in

q Carth. 433. Comb. 364. Salk. 485. 1 Lord Raym. 567.
r See p. 459.
s Salk. 427.
t Salk. 528. 2 Lord Raym. 1473.
u Stra. 544.
v Foley, 249. 251, 252. Burr. Sett. C. 370.

(25) If the parents acquire a new settlement, the children also follow, and belong to the last settlement of the father, or after the death of the father, to the last settlement of the mother, till they are emancipated or become independent of their father's or mother's family, and in that case they have that settlement which their parent had at the time of emancipation.

This is a very indefinite word, and it is no wonder that several cases have arisen upon the interpretation of it. Lord Kenyon seems to have given as full and as just an explication of it, as it will admit, in observing, that "the cases of emancipation have always been decided on the "circumstances either of the sons being twenty-one, or married, or "having gained a settlement in his own right, or having contracted a "relation, which was inconsistent with the idea of his being in a subor-"dinate situation in his father's family." 3 *T. R.* 356. 8 *T. R.* 479.

(26) In the absence or after the death of the husband, in that case the wife and her children may be removed to her maiden settlement

any parish are all reducible to this one, of *forty days residence* therein: but this forty days residence (which is construed to be lodging or lying there) must not be by fraud, or stealth, or in any clandestine manner; but made notorious, by one or other of the following concomitant circumstances. The next method therefore of gaining a settlement, is, 4. By forty days residence, and *notice*. For if a stranger comes into a parish, and delivers notice in writing of his place of abode, and number of his family, to one of the overseers, (which must be read in the church and registered,) and resides there unmolested for forty days after such notice, he is legally settled thereby[w]. For the law presumes that such a one at the time of notice is not likely to become chargeable, else he would not venture to give it; or that in such case, the parish would take care to remove him (27). But there are also other circumstances equivalent to such notice: therefore, 5. *Renting* for a year (28) a tenement of the yearly value of ten pounds, and

[w] Stat. 13 and 14 Car. II. c. 12. 1 Jac. II. c. 17. 3 and 4 W. and Mar. c. 11.

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but it seems fully determined that they cannot be separated or removed from the husband (*Bur. S. C.* 813. 1 *Stra.* 544.) The consequence is, that the whole family must be supported as casual poor in the parish where they may happen to want relief. In the removal of a wife or a widow, it is sufficient in the first instance to prove her maiden settlement. *Cald.* 39. 236.

(27) By the 35 Geo. III. c. 101. it is enacted that no person in future shall gain a settlement by such a notice.

(28) It is not necessary that the renting should be for a year; if a tenement of the yearly value of 10*l.* be taken for two months or 40 days only, it will be sufficient to give a settlement. (*Bur. S. C.* 474.) Nor is it necessary there should be any house upon the premises, even a renting of the after-grass or pasturage will be sufficient. (4 *T. R.* 348.) A person gains a settlement by residing in the parish in which part of the premises lies, but not by residing elsewhere. (2 *T. R.* 48.) It need not be one entire tenement; for if he takes one tenement in one parish, and another in a different parish, if together they are of the value of 10*l.* a year, he will gain a settlement by residing in either parish; the value only is material; it will be sufficient to give a settlement, if the enjoyment of the tenement is gratuitous, or if no rent is to be paid for it. 1 *T. R.* 458.

residing forty days in the parish, gains a settlement without notice[x], upon the principle of having substance enough to gain credit for such a house. 6. Being charged to and paying the public *taxes* and levies of the parish (29); (excepting those for scavengers, highways[y], and the duties on houses and windows[z]) and, 7. Executing, when legally appointed, any public parochial *office* for a whole year in the parish, as church-warden, &c. are both of them equivalent to notice, and gain a settlement[a], if coupled with a residence of forty days. 8. Being *hired* for a year, when unmarried and childless (30), and *serving* a year in the same service; and 9. Being bound an *apprentice*, give the servant and apprentice

x Stat. 13 and 14 Car. II. c. 12.
y Stat. 9 Geo. I. c. 7. sec. 6.
z Stat. 21 Geo. II. c. 10. 18 Geo. III. c. 36.
a Stat. 3 and 4 W. and M. c. 11.

(29) By the 35 Geo. III. c. 101. the payment of taxes for a tenement of less yearly value than 10*l.* will not give a settlement; so that this species of settlement is in effect abolished.

(30) A widower or widow with children emancipated is considered as childless, for such children cannot follow the settlement gained by their parent's service. 3 *Burn.* 445. If an unmarried man is hired for a year, but, before he enters upon the service, or during the service, marries, he may gain a settlement. 3 *T. R.* 382. But this will not extend to the continuance in the service a second year; for he was married when this new contract was expressly or impliedly entered into. *Cald.* 54. Hiring for any time certainly less than a year will not be sufficient; but from Whitsuntide to Whitsuntide is considered a year, though it will frequently happen to be a period less than 365 days. To gain a settlement as a servant there must be a hiring for a year, and a continued service for a year; but it is not necessary that the service should be subsequent to the hiring; for if there is a continued service for eleven months or any other part of a year, by any number or modes of hirings, or with any difference of wages, and afterwards a hiring for a year and a service to complete the year, a settlement is gained. *Cald.* 179. There seemed to be great reason to think that the service subsequent to the hiring for a year should at least be 40 days; but it is now decided that that is not necessary. (5 *T. R.* 98.) The settlement of a servant and an apprentice is where they last reside 40 days in their master's employ; and where they do not reside 40 days successively at one

a settlement without notice[b], in that place wherein they serve the last forty days. This is meant to encourage application to trades, and going out to reputable services. 10. Lastly, the having an *estate* of one's own, and residing thereon forty days, however small the value may be, in case it be acquired by act of law or of a third person, as by descent, gift, devise, *&c.* is a sufficient settlement[c]: but if a man acquire it by his own act, as by purchase, (in its popular sense, in consideration of money paid,) then unless the consideration advanced, *bona fide*, be 30*l.* it is no settlement for any longer time than the person shall inhabit thereon[d]. He is in no case removable from his own property; but he shall not, by any trifling or fraudulent purchase of his own, acquire a permanent and lasting settlement.

ALL persons, not so settled, may be removed to their own parishes, on complaint of the overseers, by two justices of the peace, if they shall adjudge them likely to become chargeable to the parish into which they have intruded: unless they are in a way of getting a legal settlement, as by having hired a house of 10*l. per annum*, or living in an annual service; for then they are not removable[e]. And in all other cases, if the parish to which they belong will grant them a certificate, acknowledging them to be *their* parishioners, they cannot be removed merely because likely to become chargeable, but only when they become *actually* chargeable[f]. But such certificated person can gain no settlement by any of the means above-mentioned (31); [365]

b Stat. 3 and 4 W. and M. c. 11. 8 and 9 W. III. c. 10. 31 Geo. II. c. 11.
c Salk. 524.
d Stat. 9 Geo. I. c. 7.
e Salk. 472.
f Stat. 8 and 9 W. III. c. 30.

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place, but alternately in two or more parishes, and more than 40 days upon the whole in each in the course of a year, the settlement is in that parish in which they sleep the last night. *Doug.* 633.

(31) See note (24) of this chapter.

unless by renting a tenement of 10*l.* *per annum*, or by serving an annual office in the parish, being legally placed therein: neither can an apprentice or servant to such certificated person gain a settlement by such their service[g].

These are the general heads of the laws relating to the poor, which, by the resolutions of the courts of justice thereon within a century past, are branched into a great variety (32). And yet, notwithstanding the pains that have been taken about them, they still remain very imperfect, and inadequate to the purposes they are designed for: a fate, that has generally attended most of our statute laws, where they have not the foundation of the common law to build on. When the shires, the hundreds, and the tithings, were kept in the same admirable order in which they were disposed by the great Alfred, there were no persons idle, consequently none but the impotent that needed relief: and the statute of 43 Eliz. seems entirely founded on the same principle. But when this excellent scheme was neglected and departed from, we cannot but observe with concern, what miserable shifts and lame expedients have from time to time been adopted, in order to patch up the flaws occasioned by this neglect. There is not a more necessary or more certain maxim in the frame and constitution of society, than that every individual must contribute his share, in order to the well-being of the community: and surely they must be very deficient in sound policy, who suffer one half of a parish to continue idle, dissolute, and unemployed; and at length are amazed to find, that the industry of the other half is not able to maintain the whole.

g Stat. 12 Ann. c. 18.

(32) For a full and complete knowledge of this extensive subject, recourse must be had to Burn's Justice, and Mr. Const's valuable edition of Bott, and the reporters there referred to.

CHAPTER THE TENTH.

OF THE PEOPLE, WHETHER ALIENS, DENIZENS, OR NATIVES.

HAVING, in the eight preceding chapters, treated of persons as they stand in the public relations of *magistrates*, I now proceed to consider such persons as fall under the denomination of the *people*. And herein all the inferior and subordinate magistrates treated of in the last chapter, are included.

THE first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the crown of England; that is, within the ligeance, or, as it is generally called, the allegiance of the king: and aliens, such as are born out of it. Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject. The thing itself, or substantial part of it, is founded in reason and the nature of government; the name and the form are derived to us from our Gothic ancestors. Under the feodal system, every owner of lands held them in subjection to some superior or lord, from whom or whose ancestors the tenant or vassal had received them: and there was a mutual trust or confidence subsisting between the lord and vassal, that the lord should protect the vassal in the enjoyment of the territory he had granted him, and, on the other hand, that the vassal should be faithful to the [367] lord and defend him against all his enemies. This obligation on the part of the vassal was called his *fidelitas* or fealty; and an oath of fealty was required, by the feodal law, to be taken by all tenants to their landlord, which is couched in almost the same terms as our ancient oath of allegiance[a]: except that in the usual oath of fealty there was frequently a saving or exception of the faith due to a superior lord by name,

[a] 2 Feud. 5, 6, 7.

under whom the landlord himself was perhaps only a tenant or vassal. But when the acknowledgment was made to the absolute superior himself, who was vassal to no man, it was no longer called the oath of fealty, but the oath of allegiance; and therein the tenant swore to bear faith to his sovereign lord, in opposition to all men, without any saving or exception: "*contra omnes homines fidelitatem fecit*[b]." Land held by this exalted species of fealty was called *feudum ligium*, a liege fee; the vassals *homines ligii*, or liege men; and the sovereign their *dominus ligius*, or liege lord. And when sovereign princes did homage to each other, for lands held under their respective sovereignties, a distinction was always made between *simple* homage, which was only an acknowledgment of tenure[c]; and *liege* homage, which included the fealty before-mentioned, and the services consequent upon it. Thus when our Edward III, in 1329, did homage to Philip VI. of France, for his ducal dominions on that continent, it was warmly disputed of what species the homage was to be, whether *liege* or *simple* homage[d]. But with us in England, it becoming a settled principle of tenure, that *all* lands in the kingdom are holden of the king as their sovereign and lord paramount, no oath but that of fealty could ever be taken to inferior lords, and the oath of allegiance was necessarily confined to the person of the king alone. By an easy analogy the term of allegiance was soon brought to signify all other engagements, which are due from subjects to their prince, as well as those duties which were simply and merely
[368] territorial. And the oath of allegiance, as administered for upwards of six hundred years[e], contained a promise "to be true and faithful to the king and his heirs, "and truth and faith to bear of life and limb and terrene "honor, and not to know or hear of any ill or damage "intended him, without defending him therefrom." Upon

[b] 2 Feud. 99.
[c] 7 Rep. Calvin's case. 7.
[d] 2 Cart. 401. Mod. Un. Hist. xxiii. 430.
[e] Mirror. c. 3. sec. 35. Fleta. 3. 16. Britton. c. 29. 7 Rep. Calvin's case. 6.

which sir Matthew Hale[f] makes this remark; that it was short and plain, not entangled with long or intricate clauses or declarations, and yet is comprehensive of the whole duty from the subject to his sovereign. But, at the revolution, the terms of this oath being thought perhaps to favor too much the notion of non-resistance, the present form was introduced by the convention parliament, which is more general and indeterminate than the former; the subject only promising "that he will be faithful and bear *true* allegiance to the "king," without mentioning "his heirs," or specifying in the least wherein that allegiance consists. The oath of supremacy is principally calculated as a renunciation of the pope's pretended authority: and the oath of abjuration, introduced in the reign of king William[g], very amply supplies the loose and general texture of the oath of allegiance; it recognising the right of his majesty, derived under the act of settlement; engaging to support him to the utmost of the juror's power; promising to disclose all traiterous conspiracies against him; and expressly renouncing any claim of the descendants of the late pretender, in as clear and explicit terms as the English language can furnish. This oath must be taken by all persons in any office, trust, or employment; and may be tendered by two justices of the peace to any person, whom they shall suspect of disaffection[h]. And the oath of allegiance may be tendered[i] to all persons above the age of twelve years, whether natives, denizens, or aliens, either in the court-leet of the manor, or in the sheriff's tourn, which is the court-leet of the county.

But, besides these express engagements, the law also holds that there is an implied, original, and virtual allegiance, owing from every subject to his sovereign, [369] antecedently to any express promise; and although the subject never swore any faith or allegiance in form. For as the king, by the very descent of the crown, is fully invested with all the rights and bound to all the duties of sovereignty,

f 1 Hal. P. C. 63.
g Stat. 13 W. III. c. 6.
h Stat. 1 Geo. I. c. 13. 6 Geo. III. c. 53.
i 2 Inst. 121. 1 Hal. P. C. 64.

before his coronation; so the subject is bound to his prince by an intrinsic allegiance, before the super-induction of those outward bonds of oath, homage, and fealty; which were only instituted to remind the subject of this his previous duty, and for the better securing its performance[k]. The formal profession therefore, or oath of subjection, is nothing more than a declaration in words of what was before implied in law. Which occasions sir Edward Coke very justly to observe[l], that "all "subjects are equally bounden to their allegiance, as if they "had taken the oath; because it is written by the finger of the "law in their hearts, and the taking of the corporal oath is but "an outward declaration of the same." The sanction of an oath, it is true, in case of violation of duty, makes the guilt still more accumulated, by superadding perjury to treason: but it does not increase the civil obligation to loyalty; it only strengthens the *social* tie by uniting it with that of *religion*.

ALLEGIANCE, both express and implied, is however distinguished by the law into two sorts or species, the one natural, the other local; the former being also perpetual, the latter temporary. Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth[m]. For, immediately upon their birth, they are under the king's protection; at a time too, when (during their infancy) they are incapable of protecting themselves. Natural allegiance is therefore a debt of gratitude; which cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance, nor by any thing but the united concurrence of the legislature[n]. An Englishman who removes to France, or to China, owes the same allegiance to the king of England there as at home, and twenty years hence as well as now.

[370] For it is a principle of universal law[o], that the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former: for this natural allegiance was intrinsic, and primitive, and antecedent to the

k 1 Hal. P. C. 61.
l 2 Inst. 121.
m 7 Rep. 7.
n 2 P. Wms. 134.
o 1 Hal. P. C. 68.

other; and cannot be divested without the concurrent act of that prince to whom it was first due. Indeed the natural-born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another: but it is his own act that brings him into these straits and difficulties, of owing service to two masters; and it is unreasonable that, by such voluntary act of his own, he should be able at pleasure to unloose those bands, by which he is connected to his natural prince (1.)

LOCAL allegiance is such as is due from an alien, or stranger born, for so long time as he continues within the king's dominion and protection[p]: and it ceases, the instant such stranger transfers himself from this kingdom to another (2). Natural allegiance is therefore perpetual, and local temporary

[p] 7 Rep. 6.

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(1) Sir Michael Foster observes, that "the well-known maxim, "which the writers upon our law have adopted and applied to this "case, *nemo potest exuere patriam*, comprehendeth the whole doctrine "of natural allegiance." *Fost.* 184. And this is exemplified by a strong instance in the report which that learned judge has given of Æneas Macdonald's case. He was a native of Great Britain, but had received his education from his early infancy in France, had spent his riper years in a profitable employment in that kingdom, and had accepted a commission in the service of the French king; acting under that commission, he was taken in arms against the king of England, for which he was indicted and convicted of high treason; but was pardoned upon condition of his leaving the kingdom, and continuing abroad during his life. *Ib.* 59.

This is certainly an extreme case; and we should have reason to think our laws deficient in justice and humanity, if we could discover any intermediate general limit to which the law could be relaxed consistently with sound policy or the public safety.

(2) Mr. J. Foster informs us, that it was laid down in a meeting of all the judges, that "if an alien, seeking the protection of the crown, "and having a family and effects here, should, during a war with his "native country, go thither, and there adhere to the king's enemies *for* "*purposes of hostility*, he may be dealt with as a traitor." *Fost.* 185.

only: and that for this reason, evidently founded upon the nature of government; that allegiance is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully. As therefore the prince is always under a constant tie to protect his natural-born subjects, at all times and in all countries, for this reason their allegiance due to him is equally universal and permanent. But, on the other hand, as the prince affords his protection to an alien, only during his residence in this realm, the allegiance of an alien is confined (in point of time) to the duration of such his residence, and (in point of locality) to the dominions of the British empire. From which considerations sir Matthew Hale[q] deduces this consequence, that, though there be an usurper of the crown, yet it is treason for any subject, while the usurper is in full possession of the sovereignty, [371] to practise any thing against his crown and dignity: wherefore, although the true prince regain the sovereignty, yet such attempts against the usurper (unless in defence or aid of the rightful king) have been afterwards punished with death; because of the breach of that temporary allegiance, which was due to him as king *de facto*. And upon this footing, after Edward IV. recovered the crown, which had been long detained from his house by the line of Lancaster, treasons committed against Henry VI. were capitally punished; though Henry had been declared an usurper by parliament.

This oath of allegiance, or rather the allegiance itself, is held to be applicable not only to the political capacity of the king, or regal office, but to his natural person and blood-royal: and for the misapplication of their allegiance, viz. to the regal capacity or crown, exclusive of the person of the king, were the Spencers banished in the reign of Edward II[r]. And from hence arose that principle of personal attachment, and affectionate loyalty, which induced our forefathers, (and, if occasion required, would doubtless induce their sons,) to

[q] 1 Hal. P. C. 60.

[r] 1 Hal. P. C. 67.

hazard all that was dear to them, life, fortune, and family, in defence and support of their liege lord and sovereign.

THIS allegiance then, both express and implied, is the duty of all the king's subjects, under the distinctions here laid down, of local and temporary, or universal and perpetual. Their rights are also distinguishable by the same criterions of time and locality; natural-born subjects having a great variety of rights, which they acquire by being born within the king's ligeance, and can never forfeit by any distance of place or time, but only by their own misbehaviour: the explanation of which rights is the principal subject of the two first books of these commentaries. The same is also in some degree the case of aliens; though their rights are much more circumscribed, being acquired only by residence here, and lost whenever they remove. I shall however here endeavour to chalk out some of the principal lines, whereby they are distinguished from natives, descending to farther particu- [372] lars when they come in course.

AN alien born may purchase lands, or other estates: but not for his own use; for the king is thereupon entitled to them[s] (3). If an alien could acquire a permanent property in lands, he must owe an allegiance, equally permanent with that property, to the king of England; which would probably be inconsistent with that, which he owes to his own natural liege lord: besides that thereby the nation might in time be subject to foreign influence, and feel many other inconveniences. Wherefore by the civil law such contracts were also made void[t]: but the prince had no such advantage of forfeiture thereby, as with us in England. Among other reasons which might be given for our constitution, it seems to be intended

s Co. Litt. 2. t Cod. l. 11. tit. 55.

(3) A woman alien cannot be endowed unless she marries by the license of the king; and then she shall be endowed, by 8 Hen. V. *No.* 15, *Rot. Parl. Harg. Co. Litt.* 31, *a.* n. 9. Neither can a husband alien be tenant by the courtesy. 7 *Co.* 25.

by way of punishment for the alien's presumption, in attempting to acquire any landed property: for the vendor is not affected by it, he having resigned his right, and received an equivalent in exchange. Yet an alien may acquire a property in goods, money, and other personal estate, or may hire a house for his habitation[u] (4): for personal estate is of a transitory and moveable nature; and, besides, this indulgence to strangers is necessary for the advancement of trade. Aliens also may trade as freely as other people; only they are subject to certain higher duties at the custom-house: and there are also some obsolete statutes of Henry VIII, prohibiting alien artificers to work for themselves in this kingdom; but it is generally held that they were virtually repealed by statute 5 Eliz. c. 7. (5). Also an alien may bring an action concerning personal property, and may make a will, and dispose of his personal estate[w]: not as it is in France, where the king at the death of an alien is entitled to all he is worth, by the *droit d'aubaine* or *jus albinatus*[x], unless he has a peculiar exemption. When I mention these rights of an alien, I must be understood of alien friends only, or such whose countries are in peace with ours; for alien enemies have no rights, no privileges, unless by the king's special favor, during the time of war (6).

When I say, that an alien is one who is born out of the king's dominions, or allegiance, this also must be understood

u 7 Rep. 17.
w Lutw. 34.
x A word derived from alibi natus. Spelm. Gl. 24.

(4) But a lease of lands will be forfeited to the king. *Co. Litt.* 2.

(5) Mr. Hargrave says, the statute 32 Hen. VIII. c. 16. however contrary it may seem to good policy and the spirit of commerce, still remains unrepealed. *Co. Litt.* 2. n. 7. See also 1 *Woodd.* 373.

(6) Until all ransoms of captured ships and property were prohibited by 22 Geo. III. c. 25. an alien enemy could sue in our courts upon a ransom bill. Lord Mansfield in a case of that kind declared, that "it "was sound policy, as well as good morality, to keep faith with an "enemy in time of war. This is a contract which arises out of a state "of hostility, and is to be governed by the law of nations, and the eternal rules of justice." *Doug.* 625.

with some restrictions. The common law indeed stood absolutely so; with only a very few exceptions: so that a particular act of parliament became necessary after the restoration[y], "for the naturalization of children of his majesty's "English subjects, born in foreign countries during the late "troubles." And this maxim of the law proceeded upon a general principle, that every man owes natural allegiance where he is born, and cannot owe two such allegiances, or serve two masters, at once. Yet the children of the king's embassadors born abroad were always held to be natural subjects[z]: for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent; so, with regard to the son also, he was held (by a kind of *postliminium*) to be born under the king of England's allegiance, represented by his father, the embassador. To encourage also foreign commerce, it was enacted by statute 25 Edw. III. st. 2. that all children born abroad, provided *both* their parents were at the time of the birth in allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit as if born in England: and accordingly it hath been so adjudged in behalf of merchants[a]. But by several more modern statutes[b] these restrictions are still farther taken of: so that all children, born out of the king's ligeance, whose *fathers* (or *grandfathers* by the father's side) were natural-born subjects, are now deemed to be natural-born subjects themselves, to all intents and purposes; unless their said ancestors were attainted, or banished beyond sea, for high treason; or were at the birth of such children in the service of a prince at enmity with Great Britain (7). Yet the

y Stat. 29 Car. II. c. 6.
z 7 Rep. 18.
a Cro. Car. 601. Mar. 91. Jenk. Cent. 3.
b 7 Ann. c. 5. 4 Geo. II. c. 21. and 13 Geo. III. c. 21.

(7) All these exceptions to the common law, introduced by the legislature, are in cases where the father or grandfather is a natural-born subject; but there is no provision made for the children born abroad of a mother, a natural-born subject, married to an alien. And in a late

grandchildren of such ancestors shall not be privileged in respect of the alien's duty, except they be protestants, and actually reside within the realm; nor shall be enabled to claim any estate or interest, unless the claim be made within five years after the same shall accrue.

THE children of aliens, born here in England, are, generally speaking, natural-born subjects (8), and entitled [374] to all the privileges of such. In which the constitution of France differs from ours; for there, by their *jus albinatus*, if a child be born of foreign parents, it is an alien[c] (9).

A DENIZEN is an alien born, but who has obtained *ex donatione regis* letters patent to make him an English subject: a high and incommunicable branch of the royal prerogative[d]. A denizen is in a kind of middle state, between an alien and natural-born subject, and partakes of both of them. He may take lands by purchase or devise, which an alien may not; but cannot take by inheritance[e]: for his parent, through whom he must claim, being an alien, had no inheritable blood; and therefore could convey none to the son (10). And, upon

c Jenk. Cent. 8. cites *treasure francois*. 312.

d 7 Rep. Calvin's case. 25.

e 11 Rep. 67.

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case, in which it was stated that the mother of the plaintiff was an English woman, who married a subject of France, and had a son born to him in France, it was decided that that son could not inherit his mother's lands in England. Count Duroure v. Jones, 4 *T. R.* 300.

(8) Unless the alien parents are acting in the realm as enemies; for my lord Coke says, it is not *cælum nec solum*, but their being born within the allegiance, and under the protection of the king. 7 *Co.* 18. *a.*

(9) The late learned Vinerian professor informs us, that "in this "respect there is not any difference between our laws and those of "France. In each country, birth confers the right of naturalization." 1 *Woodd.* 386.

(10) By the 11 & 12 W. III. c. 6. natural-born subjects may derive a title by descent through their parents or any ancestor, though they are aliens. But by 25 Geo. II. c. 39. this restriction is superadded, *viz.*

a like defect of hereditary blood, the issue of a denizen, born *before* denization, cannot inherit to him; but his issue born *after*, may [f]. A denizen is not excused [g] from paying the alien's duty, and some other mercantile burdens. And no denizen can be of the privy council, or either house of parliament, or have any office of trust, civil or military, or be capable of any grant of lands, &c. from the crown [h].

NATURALIZATION cannot be performed but by act of parliament: for by this an alien is put in exactly the same state as if he had been born in the king's ligeance; except only that he is incapable, as well as a denizen, of being a member of the privy council, or parliament, holding offices, grants, &c. [i] (11). No bill for naturalization can be received in either house of parliament, without such disabling clause in it [j]: nor without a clause disabling the person from obtaining any immunity in trade thereby, in any foreign country; unless he shall have resided in Britain for seven years next after the commencement of the session in which he is naturalized [k]. Neither can any person be naturalized or restored in blood, unless he hath received the sacrament of the lord's supper within one month before the bringing in of the bill; and unless he also takes the oaths of allegiance and supremacy in the presence of the parliament [l]. But these provisions have

f Co. Litt. 8. Vaugh. 285.
g Stat. 32 Hen. VIII. c. 8.
h Stat. 12 W. III. c. 2.
i Ibid.
j Stat. 1 Geo. I. c. 4.
k Stat. 14 Geo. III. c. 84.
l Stat. 7 Jac. I. c. 2.

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that no natural-born subject shall derive a title through an alien parent or ancestor, unless he be born at the time of the death of the ancestor who dies seised of the estate which he claims by descent, with this exception, that if a descent shall be cast upon a daughter of an alien, it shall be divested in favor of an after-born son; and in case of an after-born daughter or daughters only, all the sisters shall be co-parceners.

(11) This statute 12 W. III. c. 2. was passed from a jealousy of king William's partiality to foreigners.

been usually dispensed with by special acts of parliament, previous to bills of naturalization of any foreign princes or princesses [m].

[375] THESE are the principal distinctions between aliens, denizens, and natives: distinctions, which it hath been frequently endeavoured since the commencement of this century to lay almost totally aside, by one general naturalization-act for all foreign protestants. An attempt which was once carried into execution by the statute 7 Ann. c. 5. but this, after three years experience of it, was repealed by the statute 10 Ann. c. 5. except one clause, which was just now mentioned, for naturalizing the children of English parents born abroad. However, every foreign seaman, who in time of war serves two years on board an English ship by virtue of the king's proclamation, is *ipso facto* naturalized under the like restrictions as in statute 12 W. III. c. 2. [n]; and all foreign protestants, and Jews, upon their residing seven years in any of the American colonies, without being absent above two months at a time, and all foreign protestants serving two years in a military capacity there, or being three years employed in the whale fishery, without afterward absenting themselves from the king's dominions for more than one year, and none of them falling within the incapacities declared by statute 4 Geo. II. c. 21. shall be (upon taking the oaths of allegiance and abjuration, or in some cases, an affirmation to the same effect) naturalized to all intents and purposes, as if they had been born in this kingdom; except as to sitting in parliament or in the privy council, and holding offices or grants of lands, &c. from the crown within the kingdoms of Great Britain or Ireland [o]. They therefore are admissible to all other privileges, which protestants or Jews born in this kingdom are entitled to. What those privileges

m Stat. 4 Ann. c. 1. 7 Geo. II. c. 3. 9 Geo. II. c. 24. 4 Geo. III. c. 4.

n Stat. 13 Geo. II. c. 3.

o Stat. 13 Geo. II. c. 7. 20 Geo. II. c. 44. 22 Geo. II. c. 45. 2 Geo. III. c. 25. 13 Geo. III. c. 25.

are, with respect to Jews [p] in particular, was the subject of very high debates about the time of the famous Jew-bill [q]; which enables all Jews to prefer bills of naturalization in parliament, without receiving the sacrament, as ordained by statute 7 Jac. I. It is not my intention to revive this controversy again; for the act lived only a few months, and was then repealed [r]: therefore peace be now to its *manes*.

p A pretty accurate account of the Jews till their banishment in 8 Edw. I. may be found in Prynne's demurrer, and in Molloy *de jure maritimo*. b. 3. c. 6.

q Stat. 26 Geo. II. c. 26.

r Stat. 27 Geo. II. c. 1.

CHAPTER THE ELEVENTH.

OF THE CLERGY.

THE people, whether aliens, denizens, or natural-born subjects, are divisible into two kinds; the clergy and laity: the clergy comprehending all persons in holy orders, and in ecclesiastical offices, will be the subject of the following chapter.

THIS venerable body of men, being separate and set apart from the rest of the people, in order to attend the more closely to the services of almighty God, have thereupon large privileges allowed them by our municipal laws: and had formerly much greater, which were abridged at the time of the reformation on account of the ill use which the popish clergy had endeavoured to make of them. For, the laws having exempted them from almost every personal duty, they attempted a total exemption from every secular tie. But it is observed by sir Edward Coke[a], that, as the overflowing of waters doth many times make the river to lose its proper channel, so in times past ecclesiastical persons, seeking to extend their liberties beyond their true bounds, either lost or enjoyed not those which of right belonged to them. The personal exemptions do indeed for the most part continue. A clergyman cannot be compelled to serve on a jury, nor to appear at a court-leet or view of frank-pledge; which almost [377] every other person is obliged to do[b]: but if a layman is summoned on a jury, and before the trial takes orders, he shall notwithstanding appear and be sworn[c]. Neither

a 2 Inst. 4. b F. N. B. 160. 2 Inst. 4. c 4 Leon. 190.

can he be chosen to any temporal office; as bailiff, reeve, constable, or the like: in regard of his own continual attendance on the sacred function[d]. During his attendance on divine service he is privileged from arrests in civil suits[e] (1). In cases also of felony, a clerk in orders shall have the benefit of his clergy, without being branded in the hand; and may likewise have it more than once (2): in both which particulars he is distinguished from a layman[f]. But as they have their privileges, so also they have their disabilities, on account of their spiritual avocations. Clergymen, we have seen[g], are incapable of sitting in the house of commons (3); and by statute 21 Hen. VIII. c. 13. are not (in general) allowed to take any lands or tenements to farm, upon pain of 10*l. per* month, and total avoidance of the lease (4); nor upon like pain to keep any tanhouse or brewhouse (5); nor shall engage in any

d Finch. L. 88. f 2 Inst. 637. Stat. 4 Hen. VII. c. 13. and 1 Edw. VI. c. 12.
e Stat. 50 Edw. III. c. 5. 1 Ric. II. c. 16. g Page 175.

(1) That is, for a reasonable time, *eundo, redeundo, et morando*, to perform divine service. 12 *Co.* 100.

(2) This is a peculiar privilege of the clergy, that sentence of death can never be passed upon them for any number of manslaughters, bigamies, simple larcenies, or other clergyable offences; but a layman, even a peer, may be ousted of clergy, and will be subject to the judgment of death upon a second conviction of a clergyable offence; for if a layman has once been convicted of manslaughter, upon production of the conviction, he may afterwards suffer death for bigamy, or any other felony, within clergy, or which would not be a capital crime to another person not so circumstanced. But for the honor of the clergy, there are few or no instances in which they have had occasion to claim the benefit of this privilege. See 4 vol. c. 28.

(3) See p. 175. n. 37. *ante.*

(4) But if they have not sufficient glebe, they may take a farm for the necessary expenses and consumption of their households. 21 *Hen. VIII. c.* 13. *s.* 8.

(5) The singular prohibition to keep a tanhouse probably originated from a practice peculiar to the time.

manner of trade, nor sell any merchandise, under forfeiture of the treble value (6). Which prohibition is consonant to the canon law.

In the frame and constitution of ecclesiastical polity there are divers ranks and degrees: which I shall consider in their respective order, merely as they are taken notice of by the secular laws of England; without intermeddling with the canons and constitutions, by which the clergy have bound themselves. And under each division I shall consider, 1. The method of their appointment; 2. Their rights and duties; and 3. The manner wherein their character or office may cease.

I. An arch-bishop or bishop is elected by the chapter of his cathedral church, by virtue of a license from the crown. Election was, in very early times, the usual mode of elevation to the episcopal chair throughout all christendom; and this was promiscuously performed by the laity as well as the clergy[h]: till at length it becoming tumultuous, the emperors and other sovereigns of the respective kingdoms of [378] Europe took the appointment in some degree into their own hands; by reserving to themselves the right of confirming these elections, and of granting investiture of the temporalties, which now began almost universally to be annexed to this spiritual dignity; without which confirmation and investiture, the elected bishop could neither be consecrated nor receive any secular profits. This right was acknowledged in the emperor Charlemagne, *A. D.* 773, by Pope Hadrian I, and the council of Lateran[i], and universally exercised by other christian princes: but the policy of the court of Rome at the same time began by degrees to exclude the

h Per clerum et populum. Palm. 25. 2 Roll. Rep. 102. M. Paris. A. D. 1095.
i Decret. 1. dist. 63. c. 22.

(6) Though a clergyman is subject to this penalty for trading, yet his contracts are valid, and he is liable to be made a bankrupt. *Cooke, Bankr.* 33.

laity from any share in these elections, and to confine them wholly to the clergy, which at length was completely effected; the mere form of election appearing to the people to be a thing of little consequence, while the crown was in possession of an absolute negative, which was almost equivalent to a direct right of nomination. Hence the right of appointing to bishopricks is said to have been in the crown of England[k] (as well as other kingdoms in Europe) even in the Saxon times; because the rights of confirmation and investiture were in effect (though not in form) a right of complete donation[l]. But when, by length of time, the custom of making elections by the clergy only was fully established, the popes began to except to the usual method of granting these investitures, which was *per annulum et baculum*, by the prince's delivering to the prelate a ring, and pastoral staff or crosier: pretending, that this was an encroachment on the church's authority, and an attempt by these symbols to confer a spiritual jurisdiction: and pope Gregory VII, towards the close of the eleventh century, published a bulle of excommunication against all princes who should dare to confer investitures, and all prelates who should venture to receive them[m]. This was a bold step towards effecting the plan then adopted by the Roman see, of rendering the clergy entirely independent of the civil authority: and long and eager were the contests occasioned by this papal claim. But at length, when the emperor Henry V. agreed to remove all suspicion of encroachment on the spiritual character, by conferring investitures for the future *per sceptrum* and not *per annulum et baculum;* and when the kings of England and France consented also to alter the form in their kingdoms, and receive only homage from the bishops for their temporalties, instead of [379]

k Palm. 28.

l "Nulla electio praelatorum (sunt verba "Ingulphi) erat mere libera et canonica; sed "omnes dignitates tam episcoporum, quam "abbatum, per annulum et baculum regis "curia pro sua complacentia conferebat." Penes clericos et monachos fuit electio, sed electum a rege postulabant. Selden. Jan. Ang. l. 1. sec. 39.

m Decret. 2. caus. 16. qu. 7. c. 18 and 13.

investing them by the ring and crosier; the court of Rome found it prudent to suspend for a while its other pretensions[n].

This concession was obtained from king Henry the first in England, by means of that obstinate and arrogant prelate, arch-bishop Anselm[o]: but king John (about a century afterwards) in order to obtain the protection of the pope against his discontented barons, was also prevailed upon to give up by a charter, to all the monasteries and cathedrals in the kingdom, the free right of electing their prelates, whether abbots or bishops: reserving only to the crown the custody of the temporalties during the vacancy; the form of granting a license to elect, which is the original of our *conge d' eslire*) on refusal whereof the electors might proceed without it; and the right of approbation afterwards, which was not to be denied without a reasonable and lawful cause[p]. This grant was expressly recognised and confirmed in king John's *magna carta*[q], and was again established by statute 25 Edw. III. st. 6. § 3.

But by statute 25 Hen. VIII. c. 20. the ancient right of nomination was, in effect, restored to the crown (7): it being enacted that, at every future avoidance of a bishoprick, the king may send the dean and chapter his usual license to proceed to election; which is always to be accompanied with a

n Mod. Un. Hist. xxv. 363. xxix. 115.
o M. Paris. A. D. 1107.
p M. Paris. A. D. 1214. 1 Rym. Foed. 198.
q Cap. 1. edit. Oxon. 1759.

(7) This statute was afterwards repealed by 1 Edw. VI. c. 2. which enacted that all bishopricks should be donative as formerly. It states in the preamble that these elections are in very deed no elections; but only by a writ of *conge d'elire* have colors, shadows, or pretences of election, 1 *Burn. Ec. L.* 183. This is certainly good sense. For the permission to elect where there is no power to reject can hardly be reconciled with the freedom of election. But this statute was afterwards repealed by 1 Ma. st. 2. c. 20. and other statutes. 12 *Co.* 7. But the bishopricks of the new foundation were always donative. *Harg. Co. Litt.* 134. As also are all the Irish bishopricks by the 2 Eliz. c. 4. *Irish Statutes.*

letter missive from the king, containing the name of the person whom he would have them elect: and, if the dean and chapter delay their election above twelve days, the nomination shall devolve to the king, who may by letters patent appoint such person as he pleases. This election or nomination, if it be of a bishop, must be signified by the king's letters patent to the arch-bishop of the province; if it be of an arch-bishop, to the other arch-bishop and two bishops, or to four bishops; requiring them to confirm, invest, and consecrate the person so elected: which they are bound to perform immediately, without any application to the see of Rome. After which the bishop elect shall sue to the king for his temporalties, shall make oath to the king and none other, and shall take restitution of his secular possessions out of the king's hands only (8). And if such dean and chapter do not elect in the manner by this act appointed, or if such arch-bishop or bishop do refuse to confirm, invest, and consecrate such bishop elect, they shall incur all the penalties of a *praemunire* (9).

(8) It is a prevailing vulgar error, that every bishop, before he accepts the bishoprick which is offered him, affects a maiden coyness and answers *nolo episcopari*. The origin of these words and this notion I have not been able to discover; the bishops certainly give no such refusal at present, and I am inclined to think they never did at any time in this country.

(9) It is directed in the form of consecrating bishops, confirmed by various statutes since the reformation, that a bishop when consecrated must be full thirty years of age. There seems to have been no restriction of this kind in ancient times; for bishop Godwin informs us, that George Nevile, the brother of the earl of Warwick the king-maker, was chancellor of Oxford, *et in episcopum Exoniensem consecratus est anno* 1455, *nondum annus natus viginti. Anno deinde* 1460 *(id quod jure mirere) summus Angliæ factus est cancellarius.* A few years afterwards he was translated to the arch-bishoprick of York. *Hoc sedente episcopus Sancti Andreæ in Scotiâ, archiepiscopus per Sixtum quartum creatus est, jussis illi duodecim episcopis illius gentis subesse, qui hactenus archiepiscopi Eboracensis suffraganei censebantur. Reclamante quidem Eboracensi, sed frustra; asserente pontifice, minimè convenire, ut ille Scotiæ sit metropoli-*

An arch-bishop is the chief of the clergy in a whole province; and has the inspection of the bishops of that province, as well as of the inferior clergy, and may deprive them on notorious cause[r] (10). The arch-bishop has also his own diocese, wherein he exercises episcopal jurisdiction; as in his province he exercises archiepiscopal. As arch-bishop, he, upon receipt of the king's writ, calls the bishops and clergy of his province to meet in convocation: but without the king's writ he cannot assemble them[s]. To him all appeals are made from inferior jurisdictions within his province; and, as an appeal lies from the bishops in person to him in person, so it also lies from the consistory courts of each diocese to his archiepiscopal court. During the vacancy of any see in his province, he is guardian of the spiritualties thereof, as the king is of the temporalties; and he executes all ecclesiastical jurisdiction therein. If an archiepiscopal see be vacant, the dean and chapter are the spiritual guardians, ever since the office of prior of Canterbury was abolished at the reformation[t]. The arch-bishop is entitled to present by lapse to all the ecclesiastical livings in the disposal of his [381] diocesan bishops, if not filled within six months. And the arch-bishop has a customary prerogative, when a bishop is consecrated by him, to name a clerk or chaplain of his own to be provided for by such suffragan bishop; in lieu of which it is now usual for the bishop to make over by deed to the arch-bishop, his executors and assigns, the next pre-

r Lord Raym. 541. s 4 Inst. 322, 323. t 2 Roll. Abr. 22.

tanus, qui propter crebra inter Scotos ac Anglos bella Scotis plerumque hostis sit capitalis. Godw. Comm. de Præsul. 693.

(10) In the 11 W. III. the bishop of St. David's was deprived for simony, and other offences, in a court held at Lambeth before the arch-bishop, who called to his assistance six other bishops. The bishop of St. David's appealed to the delegates, who affirmed the sentence of the arch-bishop; and after several fruitless applications to the court of king's bench and the house of lords, he was at last obliged to submit to the judgment. *Lord Raym.* 541. 1 *Burn. Ec. L.* 212.

sentation of such dignity or benefice in the bishop's disposal within that see, as the arch-bishop himself shall choose; which is therefore called his *option*[u]; which options are only binding on the bishop himself who grants them, and not on his successors (11). The prerogative itself seems to be derived from the legatine power formerly annexed by the popes to the metropolitan of Canterbury[w]. And we may add, that the papal claim itself (like most others of that encroaching see) was probably set up in imitation of the imperial prerogative called *primae* or *primariae preces*; whereby the emperor exercises, and hath immemorially exercised[x], a right of naming to the first prebend that becomes vacant after his accession in every church of the empire[y]. A right, that was also exercised by the crown of England in the reign of Edward I[z]; and which probably gave rise to the royal coroodies which were mentioned in a former chapter[a]. It is likewise the privilege, by custom, of the arch-bishop of Canter-

u Cowel's interp. tit. option.

w Sherlock of options. 1.

x Goldast. *constit. Imper.* tom. 3. p. 406.

y Dufresne. V. 806. Mod. Univ. Hist. xxix. 5.

z Rex, etc. salutem. Scribatis episcopo Karl quod—Roberto de Iesrd pensionem suam, quam ad preces regis praedicto Roberto concessit, de caetero solvat; et de proxima ecclesia vacatura de collatione praedicti episcopi, quam ipse Robertus acceptaverit, respiciat. Brev. 11 Edw. I. 3 Pryn. 1264.

a Ch. 8. page 284.

(11) The consequence is, that the arch-bishop never can have more than one option at once from the same diocese. These options become the private patronage of the arch-bishop, and upon his death are transmitted to his personal representatives; or the arch-bishop may direct by his will, whom, upon a vacancy, his executor shall present; which direction, according to a decision in the house of lords, his executor is compellable to observe. 1 *Burn. Ec. L.* 226. If a bishop dies during the vacancy of any benefice within his patronage, the presentation devolves to the crown; so likewise if a bishop dies after an option becomes vacant, and before the arch-bishop or his representative has presented, and the clerk is instituted, the crown *pro hac vice* will be entitled to present to that dignity or benefice. *Amb.* 101. For the grant of the option by the bishop to the arch-bishop has no efficacy beyond the life of the bishop.

bury, to crown the kings and queens of this kingdom (12). And he hath also by the statute 25 Hen. VIII. c. 21. the power of granting dispensations in any case, not contrary to the holy scriptures and the law of God, where the pope used formerly to grant them: which is the foundation of his granting special licences, to marry at any place or time, to hold two livings, and the like (13): and on this also is founded the right he exercises of conferring degrees (14), in prejudice of the two universities[b].

[382] The power and authority of a bishop, besides the administration of certain holy ordinances peculiar to that sacred order, consist principally in inspecting the manners of the people and clergy, and punishing them in order to reformation, by ecclesiastial censures. To this purpose he has several courts under him, and may visit at pleasure every part of his diocese. His chancellor is appointed to hold his courts for him, and to assist him in matters of ecclesiastical law; who, as well as all other ecclesiastical officers, if lay or

b See the bishop of Chester's case. Oxon. 1721.

(12) It is said that the arch-bishop of York has the privilege to crown the queen-consort, and to be her perpetual chaplain. 1 *Burn. Ec. L.* 178.

(13) When the dominion of the pope was overturned in this country, this prerogative of dispensing with the canons of the church was transferred by that statute to the arch-bishop of Canterbury in all cases in which dispensations were accustomed to be obtained at Rome; but in cases unaccustomed, the matter shall be referred to the king and council. The pope could have dispensed with every ecclesiastical canon and ordinance. But in some of the cases where the arch-bishop alone has authority to dispense, his dispensation with the canon, as to hold two livings, must be confirmed under the great seal.

(14) But although the arch-bishop can confer all the degrees which are taken in the universities, yet the graduates of the two universities, by various acts of parliament and other regulations, are entitled to many privileges which are not extended to what is called a Lambeth degree: as, for instance, those degrees which are a qualification for a dispensation to hold two livings, are confined by 21 Hen. VIII. c. 13. s. 23. to the two universities.

married, must be a doctor of the civil law, so created in some university[c]. It is also the business of a bishop to institute, and to direct induction, to all ecclesiastical livings in his diocese.

ARCHBISHOPRICKS and bishopricks may become void by death, deprivation for any very gross and notorious crime, and also by resignation. All resignations must be made to some superior[d]. Therefore a bishop must resign to his metropolitan; but the arch-bishop can resign to none but the king himself (15).

II. A DEAN and chapter are the council of the bishop, to assist him with their advice in affairs of religion, and also in the temporal concerns of his see[e]. When the rest of the clergy were settled in the several parishes of each diocese, (as hath formerly[f] been mentioned,) these were reserved for the celebration of divine service in the bishop's own cathedral; and the chief of them, who presided over the rest, obtained the name of *decanus* or dean, being probably at first appointed to superintend *ten* canons or prebendaries.

ALL ancient deans are elected by the chapter, by *conge d' eslire* from the king, and letters missive of recommendation; in the same manner as bishops (16): but in those chapters, that were founded by Henry VIII. out of the spoils of the dissolved monasteries (17), the deanery is donative, and the installation

c Stat. 37 Hen. VIII. c. 17.
d Gibs. cod. 332.
e 3 Rep. 75. Co. Litt. 103. 300.
f page 113, 114.

(15) The following are some of the popular distinctions between arch-bishops and bishops. The arch-bishops have the titles and style of *grace*, and *most reverend father in God by divine providence*; the bishops those of *lord*, and *right reverend father in God by divine permission*. Arch-bishops are inthroned, *inthronizati*; bishops installed.

(16) See a very learned note, containing a full history of the election, presentation, or donation to deaneries, by Mr. Hargrave in Co. Litt. 95.

(17) The new deaneries and chapters to old bishopricks are eight, *viz.* Canterbury, Norwich, Winchester, Durham, Ely, Rochester, Worcester, and Carlisle; and five new bishopricks with new deaneries

merely by the king's letters patent [g]. The chapter, consisting of canons or prebendaries, are sometimes appointed by the king, sometimes by the bishop, and sometimes elected by each other.

THE dean and chapter are, as was before observed, the nominal electors of a bishop. The bishop is their ordinary (18) and immediate superior; and has, generally speaking, the power of visiting them, and correcting their excesses and enormities. They had also a check on the bishop at common law: for till the statute 32 Hen. VIII. c. 28. his grant or lease would not have bound his successors, unless confirmed by the dean and chapter [h].

DEANERIES and prebends may become void, like a bishoprick, by death, by deprivation, or by resignation to either the king or the bishop [i]. Also I may here mention, once for all, that if a dean, prebendary, or other spiritual person be made a bishop, all the preferments of which he was before possessed are void; and the king may present to them in right of his prerogative royal. But they are not void by the election, but only by the consecration [j].

III. AN arch-deacon hath an ecclesiastical jurisdiction, immediately subordinate to the bishop, throughout the whole of his diocese, or in some particular part of it. He is usually appointed by the bishop himself; and hath a kind of episcopal authority, originally derived from the bishop, but now independent and distinct from his [k]. He therefore visits the clergy; and has his separate court for punishment of offenders

g Gibs. cod. 173.
h Co. Litt. 103.
i Plowd. 498.
j Bro. *Abr. t. presentation.* 3. 61. Cro. Eliz. 542. 790. 2 Roll. Abr. 352. 4 Mod. 200. Salk. 137.
k 1 Burn. eccl. law. 68, 69.

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and chapters annexed were created, *viz.* Peterborough, Chester, Gloucester, Bristol, and Oxford. *Harg. Co. Litt.* 95. n. 12.

(18) The bishop is generally called the ordinary, but *the ordinary* has a more extensive signification, as it includes every ecclesiastical judge who has the regular *ordinary* jurisdiction independent of another. 1 *Burn. Ec. L.* 22. *Co. Litt.* 344.

by spiritual censures, and for hearing all other causes of ecclesiastical cognisance.

IV. The rural deans are very ancient officers of the church[l], but almost grown out of use; though their deaneries still subsist as an ecclesiastical division of the diocese, or archdeaconry. They seem to have been deputies of [384] the bishop, planted all round his diocese, the better to inspect the conduct of the parochial clergy, to inquire into and report dilapidations, and to examine the candidate for confirmation; and armed, in minuter matters, with an inferior degree of judicial and coercive authority[m].

V. The next, and indeed the most numerous, order of men, in the system of ecclesiastical polity, are the parsons and vicars of churches: in treating of whom I shall first mark out the distinction between them; shall next observe the method by which one may become a parson or vicar; shall then briefly touch upon their rights and duties; and shall, lastly, shew how one may cease to be either.

A parson, *persona ecclesiae*, is one that hath full possession of all the rights of a parochial church. He is called parson, *persona*, because by his person the church, which is an invisible body, is represented; and he is in himself a body corporate, in order to protect and defend the rights of the church (which he personates) by a perpetual succession[n]. He is sometimes called the rector, or governor, of the church: but the appellation of *parson* (however it may be depreciated by familiar, clownish, and indiscriminate use) is the most legal, most beneficial, and most honorable title that a parish priest can enjoy; because such a one, (sir Edward Coke observes,) and he only, is said *vicem seu personam ecclesiae gerere*. A parson has, during his life, the freehold in himself of the parsonage house, the glebe, the tithes, and other dues. But these are sometimes *appropriated*; that is to say, the benefice is perpetually annexed to some spiritual corporation, either sole or aggregate, being the patron of the living; which the

l Kennet. par. antiq. 633. m Gibs. cod. 972. 1580. n Co. Litt. 300.

law esteems equally capable of providing for the service of the church, as any single private clergyman. This contrivance seems to have sprung from the policy of the monastic orders, who have never been deficient in subtile inventions for the increase of their own power and emoluments. At the first establishment of parochial clergy, the tithes of the parish were distributed in a fourfold division; one for the use of the bishop, another for maintaining the fabric of the [385] church, a third for the poor, and the fourth to provide for the incumbent. When the sees of the bishops became otherwise amply endowed, they were prohibited from demanding their usual share of these tithes, and the division was into three parts only. And hence it was inferred by the monasteries, that a small part was sufficient for the officiating priest; and that the remainder might well be applied to the use of their own fraternities, (the endowment of which was construed to be a work of the most exalted piety,) subject to the burden of repairing the church and providing for its constant supply. And therefore they begged and bought, for masses and obits, and sometimes even for money, all the advowsons within their reach, and then appropriated the benefices to the use of their own corporation. But, in order to complete such appropriation effectually, the king's license, and consent of the bishop, must first be obtained: because both the king and the bishop may some time or other have an interest, by lapse, in the presentation to the benefice; which can never happen if it be appropriated to the use of a corporation, which never dies: and also because the law reposes a confidence in them, that they will not consent to any thing that shall be to the prejudice of the church. The consent of the patron also is necessarily implied: because (as was before observed) the appropriation can be originally made to none, but to such spiritual corporation, as is also the patron of the church; the whole being indeed nothing else, but an allowance for the patrons to retain the tithes and glebe in their own hands, without presenting any clerk, they

themselves undertaking to provide for the service of the church[o]. When the appropriation is thus made, the appropriators and their successors are perpetual parsons of the church; and must sue and be sued, in all matters concerning the rights of the church, by the name of parsons[p].

THIS appropriation may be severed, and the church become disappropriate, two ways: as, first, if the patron or appropriator presents a clerk, who is instituted and inducted to the parsonage: for the incumbent so instituted and [386] inducted is to all intents and purposes complete parson; and the appropriation, being once severed, can never be re-united again, unless by a repetition of the same solemnities[q]. And, when the clerk so presented (19) is distinct from the vicar, the rectory thus vested in him becomes what is called a *sine-cure* (20); because he hath no cure of souls, having a vicar under him to whom that cure is committed[r]. Also, if the corporation which has the appropriation is dissolved, the parsonage becomes disappropriate at common law; because the perpetuity of person is gone, which is necessary to support the appropriation.

IN this manner, and subject to these conditions, may appropriations be made at this day (21); and thus were most, if not

o Plowd. 496—500.
p Hob. 307.
q Co. Litt. 46.
r Sine-cures might also be created by other means. 2 Burn. eccl. law. 347.

(19) The editor conceives that there is no authority or reason to suppose, that the appropriator can thus create a sinecure rector. But if the appropriator or impropriator should, either by design or mistake, present his clerk to the parsonage, it is held, that the vicarage will ever afterwards be dissolved, and the incumbent will be entitled to all the tithes and dues of the church as rector. *Wats. c.* 17.° 2 *R. Ab.* 338.

(20) Wherever a rector and vicar are presented and instituted to the same benefice, the rector is excused all duty, and has what is properly called a sinecure. But where there is only one incumbent, the benefice is not in law a sinecure, though there should be neither a church nor any inhabitants within the parish.

(21) It surely may be questioned whether such a power any longer exists; it cannot be supposed that, at this day, the inhabitants of a parish,

all, of the appropriations at present existing originally made; being annexed to bishopricks, prebends, religious houses, nay even to nunneries and certain military orders, all of which were spiritual corporations. At the dissolution of monasteries by statutes 27 Hen. VIII. c. 28. and 31 Hen. VIII. c. 13. the appropriations of the several parsonages, which belonged to those respective religious houses, (amounting to more than one third of all the parishes in England[s],) would have been by the rules of the common law disappropriated; had not a clause in those statutes intervened, to give them to the king in as ample a manner as the abbots, &c. formerly held the same, at the time of their dissolution. This, though perhaps scarcely defensible, was not without example; for the same was done in former reigns, when the alien priories (that is, such as were filled by foreigners only) were dissolved and given to the crown[t]. And from these two roots have sprung all the lay appropriations or secular parsonages, which we now see in the kingdom; they having been afterwards granted out from time to time by the crown[u].

[387] These appropriating corporations, or religious houses, were wont to depute one of their own body to

s Seld. review of tith. c. 9. Spelm. Apology. 35.

t 2 Inst. 584.

u Sir H. Spelman (of tithes, c. 29.) says, these are now called impropriations, as being *improperly* in the hands of laymen.

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who had been accustomed to pay their tithes, to their officiating minister, could be compelled to tranfer them to an ecclesiastical corporation, to which they might perhaps be perfect strangers. Appropriations are said to have originated from an opinion inculcated by the monks, that tithes and oblations, though payable to some church, yet were an arbitrary disposition of the donor, who might give them, as the reward of religious service done to him, to any person whatever from whom he received that service. 1 *Burn. Ec. L.* 63. And till they had got complete possession of the revenues of the church, they spared no pains to recommend themselves as the most deserving objects of the gratitude and benefaction of the parish. There probably have been no new appropriations since the dissolution of monasteries.

perform divine service, and administer the sacraments, in those parishes of which the society was thus the parson. This officiating minister was in reality no more than a curate, deputy, or vicegerent of the appropriator, and therefore called *vicarius* or *vicar*. His stipend was at the discretion of the appropriator, who was however bound of common right to find somebody, *qui illi de temporalibus, episcopo de spiritualibus, debeat respondere*[w]. But this was done in so scandalous a manner, and the parishes suffered so much by the neglect of the appropriators, that the legislature was forced to interpose: and accordingly it is enacted by statute 15 Ric. II. c. 6. that in all appropriations of churches, the diocesan bishop shall ordain (in proportion to the value of the church) a competent sum to be distributed among the poor parishioners annually; and that the vicarage shall be *sufficiently* endowed. It seems the parishes were frequently sufferers, not only by the want of divine service, but also by withholding those alms, for which, among other purposes, the payment of tithes was originally imposed: and therefore in this act a pension is directed to be distributed among the poor parochians, as well as a sufficient stipend to the vicar. But he, being liable to be removed at the pleasure of the appropriator, was not likely to insist too rigidly on the legal sufficiency of the stipend: and therefore by statute 4 Hen. IV. c. 12. it is ordained, that the vicar shall be a secular person, not a member of any religious house; that he shall be vicar perpetual, not removable at the caprice of the monastery; and that he shall be canonically instituted and inducted, and be sufficiently endowed, at the discretion of the ordinary, for these three express purposes, to do divine service, to inform the people, and to keep hospitality (22). The endowments in consequence

w Seld. tith. c. 11. 1.

(22) From this act we may date the establishment of vicarages; for before this time the vicar in general was nothing more than a temporary curate, and when the church was appropriated to a monas-

of these statutes have usually been by a portion of the glebe, or land, belonging to the parsonage, and a particular share of the tithes which the appropriators found it most trouble-
[388] some to collect, and which are therefore generally called privy or small tithes; the greater, or predial, tithes being still reserved to their own use. But one and the same rule was not observed in the endowment of all vicarages. Hence some are more liberally, and some more scantily, endowed: and hence the tithes of many things, as wood in particular, are in some parishes rectorial, and in some vicarial tithes.

THE distinction therefore of a parson and vicar is this: the parson has for the most part the whole right to all the ecclesiastical dues in his parish; but a vicar has generally an

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tery, he was generally one of their own body, that is, one of the regular clergy; for the monks who lived *secundum regulas* of their respective houses or societies, were denominated regular clergy, in contradistinction to the parochial clergy, who performed their ministry in the world *in seculo*, and who from thence were called secular clergy. All the tithes or dues of the church of common right belonged to the rector, or to the appropriator or impropriator, who have the same rights as the rector; and the vicar is entitled only to that portion which is expressed in his endowment, or what his predecessors have immemorially enjoyed by prescription, which is equivalent to a grant or endowment. And where there is an endowment he may in general recover all that is contained in it; and he may still retain what he and his predecessors have enjoyed by prescription though not expressed in it; for such a prescription amounts to evidence of another consistent endowment. But I have heard lord chancellor Eldon declare, that, if a vicar enjoys property not mentioned in an endowment, and has never within time of memory possessed what is expressly contained in it, a jury might presume that he had the former in lieu of the latter. These endowments frequently invest the vicar with some part of the great tithes; therefore the words rectorial and vicarial tithes have no definite signification. But great and small tithes are technical terms, and which are, or ought to be, accurately defined and distinguished by the law.

appropriator over him, entitled to the best part of the profits, to whom he is in effect perpetual curate, with a standing salary (23). Though in some places the vicarage has been considerably augmented by a large share of the great tithes; which augmentations were greatly assisted by the statute 29 Car. II. c. 8. enacted in favor of poor vicars and curates, which rendered such temporary augmentations (when made by the appropriators) perpetual.

THE method of becoming a parson or vicar is much the same. To both there are four requisites necessary; holy orders; presentation; institution; and induction. The method of conferring the holy orders of deacon and priest, according to the liturgy and canons[x], is foreign to the purpose of these commentaries; any farther than as they are necessary requisites to make a complete parson or vicar. By common law, a deacon, of any age, might be instituted and inducted to a parsonage or vicarage: but it was ordained by statute 13 Eliz. c. 12. that no person under twenty-three years of age, and in deacon's orders, should be presented to any benefice with cure; and if he were not ordained priest within one year

x See 2 Burn. eccl. law. 103.

(23) A vicar, from what has been advanced in the preceding page and note, must necessarily have an appropriator over him, or a sinecure rector, who in some books is considered and called an appropriator. Of benefices, some have never been appropriated; consequently in those there can be no vicar, and the incumbent is rector, and entitled to all the dues of the church. Some were appropriated to secular ecclesiastical corporations, which appropriations still exist, except perhaps some few which may have been dissolved; others were appropriated to the houses of the regular clergy; all which appropriations, at the dissolution of monasteries, were transferred to the crown; and in the hands of the king or his grantees, are now called impropriations: but in some appropriated churches no perpetual vicar has ever been endowed; in that case the officiating minister is appointed by the appropriator or impropriator, and is called a perpetual curate.

after his induction, he should be *ipso facto* deprived: and now, by statute 13 & 14 Car. II. c. 4. no person is capable to be admitted to any benefice, unless he hath been first ordained a priest (24); and then he is, in the language of the law, a clerk in orders. But if he obtains orders, or a license [389] to preach, by money or corrupt practices (which seems to be the true, though not the common, notion of simony) the person giving such orders forfeits[y] 40*l.* and the person receiving 10*l.* and is incapable of any ecclesiastical preferment for seven years afterwards.

ANY clerk may be presented[z] to a parsonage or vicarage; that is, the patron, to whom the advowson of the church belongs, may offer his clerk to the bishop of the diocese to be instituted. Of advowsons, or the right of presentation, being a species of private property, we shall find a more convenient place to treat in the second part of these commentaries. But when a clerk is presented, the bishop may refuse him upon many accounts. As, 1. If the patron is excommunicated, and remains in contempt forty days[a]. Or, 2. If the clerk be unfit[b]: which unfitness is of several kinds. First, with regard to his person; as if he be a bastard (25), an outlaw, an excommunicate, an alien, under age, or the like[c]. Next, with regard to his faith or morals; as for any particular heresy, or vice that is *malum in se:* but if the bishop

y Stat. 31 Eliz. c. 6.

z A layman may also be presented; but he must take priest's orders before his admission. 1 Burn. 103.

a 2 Roll. Abr. 355.

b Glan. l. 13. c. 20.

c 2 Roll. Abr. 356. 2 Inst. 632. Stat. 3 Ric. II. c. 3. 7 Ric. II. c. 12.

(24) By canon 34, no one shall be admitted to the order of a deacon till he be twenty-three years old; and by that canon, and also by 13 Eliz. c. 12. no one can take the order of a priest till he be full four and twenty years old. 3 *Burn. Ec. L.* 27.

(25) Though this be classed in the books among the causes of refusal, yet such is the liberality of the present times, that no one need apprehend that his preferment would be impeded by the incontinence of his parents, or by any demerit but his own.

alleges only in generals, as that he is *schismaticus inveteratus*, or objects a fault that is *malum prohibitum* merely, as haunting taverns, playing at unlawful games, or the like; it is not good cause of refusal[d]. Or, lastly, the clerk may be unfit to discharge the pastoral office for want of learning. In any of which cases the bishop may refuse the clerk. In case the refusal is for heresy, schism, inability of learning, or other matter of ecclesiastical cognisance, there the bishop must give notice to the patron of such his cause of refusal, who, being usually a layman, is not supposed to have knowledge of it; else he cannot present by lapse: but, if the cause be temporal, there he is not bound to give notice[e].

[390] If an action at law be brought by the patron against the bishop for refusing his clerk, the bishop must assign the cause. If the cause be of a temporal nature and the fact admitted, (as, for instance, outlawry,) the judges of the king's courts must determine its validity, or, whether it be sufficient cause of refusal: but if the fact be denied, it must be determined by a jury. If the cause be of a spiritual nature, (as, heresy, particularly alleged,) the fact, if denied, shall also be determined by a jury; and if the fact be admitted or found, the court upon consultation and advice of learned divines shall decide its sufficiency[f]. If the cause be want of learning, the bishop need not specify in what points the clerk is deficient, but only allege that he is deficient[g]: for the statute 9 Edw. II. st. 1. c. 13. is express, that the examination of the fitness of a person presented to a benefice belongs to the ecclesiastical judge. But because it would be nugatory in this case to demand the reason of refusal from the ordinary, if the patron were bound to abide by his determination, who has already pronounced his clerk unfit: therefore if the bishop returns the clerk to be *minus sufficiens in literatura*, the court shall write to the metropo-

d 5 Rep. 58.
e 2 Inst. 632.
f 2 Inst. 632.
g 5 Rep. 58. 3 Lev. 312.

litan, to re-examine him, and certify his qualifications; which certificate of the arch-bishop is final[h].

If the bishop hath no objections, but admits the patron's presentation, the clerk so admitted is next to be instituted by him; which is a kind of investiture of the spiritual part of the benefice: for by institution the care of the souls of the parish is committed to the charge of the clerk. When a vicar is instituted, (he besides the usual forms) takes, if required by the bishop (26), an oath of perpetual residence; for the maxim of law is, that *vicarius non habet vicarium*: and, as the non-residence of the appropriators was the cause of the perpetual establishment of vicarages, the law judges it very improper for them to defeat the end of their consti-
[391] tution, and by absence to create the very mischief which they were appointed to remedy: especially as, if any profits are to arise from putting in a curate and living at a distance from the parish, the appropriator, who is the real parson, has undoubtedly the elder title to them. When the ordinary is also the patron, and *confers* the living, the presentation and institution are one and the same act, and are called a collation to a benefice. By institution or collation the church is full, so that there can be no fresh presentation till another vacancy, at least in the case of a common patron: but the church is not full against the king, till induction: nay, even if a clerk is instituted upon the king's presentation, the crown may revoke it before induction, and present another clerk[i]. Upon institution also the clerk may enter on the parsonage house and glebe, and take the tithes; but he cannot grant or let them, or bring an action for them, till induction.

h 2 Inst. 632. i Co. Litt. 344.

(26) It does not appear that the bishop can dispense with the vicar's oath, which is, that he will be resident upon his vicarage, unless dispensed withal by his diocesan. 1 *Burn. Ec. L.* 148.

INDUCTION is performed by a mandate from the bishop to the arch-deacon, who usually issues out a precept to other clergymen to perform it for him. It is done by giving the clerk corporal possession of the church, as by holding the ring of the door, tolling a bell, or the like; and is a form required by law, with intent to give all the parishioners due notice, and sufficient certainty of their new minister, to whom their tithes are to be paid. This therefore is the investiture of the temporal part of the benefice, as institution is of the spiritual. And when a clerk is thus presented, instituted, and inducted into a rectory, he is then, and not before, in full and complete possession, and is called in law *persona impersonata*, or parson imparsonee[k].

THE rights of a parson or vicar, in his tithes and ecclesiastical dues, fall more properly under the second book of these commentaries: and as to his duties, they are principally of ecclesiastical cognisance; those only excepted which are laid upon him by statute. And those are indeed so numerous, that it is impracticable to recite them here with any tolerable conciseness or accuracy. Some of [392] them we may remark, as they arise in the progress of our inquiries, but for the rest I must refer myself to such authors as have compiled treatises expressly upon this subject[l]. I shall only just mention the article of residence, upon the supposition of which the law doth style every parochial minister an incumbent. By statute 21 Hen. VIII. c. 13. persons wilfully (27) absenting themselves from their benefices, for one month together, or two months in the year, incur a penalty of *5l.* to the king, and *5l.* to any person

k Co. Litt. 300.

l These are very numerous: but there are few which can be relied on with certainty. Among these are bishop Gibson's *codex*. Dr. Burn's *ecclesiastical law*, and the earlier editions of the *clergyman's law*, published under the name of Dr. Watson, but compiled by Mr. Place a barrister.

(27) Ill health, or any inevitable absence, is an exemption from the penalties of this statute. *Gibs. Cod.* 887.

that will sue for the same (28): except chaplains to the king, or others therein mentioned[m], during their attendance in the household of such as retain them (29): and also except[n] all heads of houses, magistrates (30), and professors in the universities, and all students under forty years of age residing there, *bona fide*, for study. Legal residence is not only in the parish, but also in the parsonage house, if

m Stat. 25 Hen. VIII. c. 16. 33 Hen. VIII. c. 28. n Stat. 28 Hen. VIII. c. 13.

(28) This statute must be put in suit by a common informer within a year, or by the king within two years, after the end of that year; so that 12 penalties, or 120*l.* may be recovered at once by a subject for himself and the king, or the king may recover at once 25 penalties, or 250*l.* (See 4 vol. 308.) But, independent of this statute, the bishop in his court may compel the residence of all clergy, who have the cure or care of souls within his diocese. 3 *Burn. Ec. L.* 281. *Gibs.* 887. This statute is not confined to parsonages and vicarages, but extends to all archdeaconries, deaneries, and dignities in cathedral and collegiate churches. Those who have two benefices or dignities, upon each of which residence is required, must reside upon one or the other. But it has lately been decided, that the incumbent of an augmented curacy cannot be prosecuted under the statute for the penalties of non-residence. 4 *T. R.* 665.

Several actions having been brought for penalties incurred under this act for non-residence, proceedings in those actions were repeatedly stayed (by statutes 41 Geo. III. U. K. c. 102. 42 Geo. III. c. 30. 86.) At the time of passing these acts it was understood that some permanent regulations on this subject were in the contemplation of the legislature.

(29) The king can give a license to his chaplains for non-residence, even whilst they do not attend his household; but the chaplains of noblemen are only excused during their actual attendance upon their lords or ladies. 3 *Burn. Ec. L.* 290.

(30) Viz. the chancellor, vice-chancellor, commissary, doctors of the chair, (*i. e.* doctors who used to preside in the public schools,) and readers of lectures; and under this description only, can professors claim an exemption from residence.

there be one: for it hath been resolved[o], that the statute intended residence, not only for serving the cure, and for hospitality; but also for maintaining the house, that the successor also may keep hospitality there: and, if there be no parsonage house, it hath been holden that the incumbent is bound to hire one, in the same or some neighbouring parish (31), to answer the purposes of residence. For the more effectual promotion of which important duty among the parochial clergy, a provision is made by the statute 17 Geo. III. c. 53. for raising money upon ecclesiastical benefices, to be paid off by annually decreasing instalments, and to be expended in rebuilding or repairing the houses belonging to such benefices (32).

[o] 6 Rep. 21.

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(31) It has been decided, by the court of king's bench, that even where there is no parsonage-house, the incumbent is bound to reside within the parish. *Cowp.* 429. If a clergyman had one benefice with a parsonage-house, and another benefice without a house, the Editor conceives that he is not bound to reside in that parish in which there is a house, for more important duties may impel him to reside within the parish where there is no house; and that such residence would exempt him from the penalties of the statute. But where the archdeacon of St. Alban's had the living of Bushey within his archdeaconry, to which living there is a parsonage-house belonging, and he resided in the parish of Bushey, but not in the parsonage-house; it was held by the court of king's bench, that he was subject to the penalties of non-residence, though he was living within the limits of his archdeaconry, to which dignity there is no house appurtenant. *5 Burr.* 2722. If then the Editor's opinion be well-founded, the decision must have been different, if he had resided in any other part of his archdeaconry out of the parish of Bushey.

(32) This act enables the incumbent, when there is no parsonage-house, or where it is so ruinous as not to be repaired with one year's income of the living, to borrow, with the consent of the patron and ordinary, upon mortgage of the revenue of the living, a sum not exceeding two years clear value, to be laid out in repairs, building, or the

We have seen that there is but one way, whereby one may become a parson or vicar: there are many ways, by which one may cease to be so. 1. By death. 2. By cession, in taking another benefice. For by statute 21 Hen. VIII. c. 13. if any one having a benefice of 8*l. per annum*, or upwards, (according to the present valuation in the king's books [p],) accepts any other, the first shall be adjudged void, unless he obtains a dispensation (33), which no one is enti-

[p] Cro. Car. 456.

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purchase of a house. The interest of the money borrowed, is to be repaid by the incumbent yearly, and 5*l. per cent.* of the original sum; or 10*l. per cent.* if he does not reside twenty weeks within a year. And where the income is 100*l.* a year, and the incumbent does not reside twenty weeks within a year, the patron and the ordinary are empowered to undertake this without his consent. The governors of queen Anne's bounty may lend money upon such mortgages, at 4*l. per cent.* interest; and 100*l.* upon a living under 40*l.* a year without any interest. Colleges and other corporations may lend money for this purpose upon their own livings, without interest. For forms and mode of proceeding, consult the statute at large. It is very remarkable that, under this act, the money borrowed was directed to be discharged by paying 5*l. per cent.* yearly upon the principal remaining due; the consequence was, that it would have been diminished by decreasing instalments, which would have produced an infinite series, or the whole could never have been paid. And it required another act, the 21 Geo. III. c. 66. which was passed merely for the purpose of correcting this palpable blunder, by which statute, the original sum must be paid, as stated, at the farthest, within twenty years.

(33) But both the livings must have cure of souls; and the statute expressly excepts deaneries, archdeaconries, chancellorships, treasurerships, chanterships, prebends, and sinecure rectories; a dispensation in this case can only be granted to hold one benefice more, except to clerks, who are of the privy council, who may hold three by dispensation. By the canon law, no person can hold a second incompatible benefice without a dispensation; and in that case, if the first is under 8*l. per annum*, it is so far void that the patron may present another

tled to have, but the chaplains (34) of the king, and others therein mentioned, the brethren and sons of lords and

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clerk, or the bishop may deprive; but till deprivation, no advantage can be taken by lapse. But independent of the statute, a clergyman by dispensations may hold any number of benefices, if they are all under 8*l.* *per annum*, except the last, and then, by a dispensation under the statute, he may hold one more.

By the 41st canon of 1603, the two benefices must not be farther distant from each other than 30 miles, and the person obtaining the dispensation must at least be a master of arts in one of the universities. But the provisions of this canon are not enforced or regarded in the temporal courts. 2 *Black. Rep.* 968. See note 14. p. 83.

It had been doubted whether the statute 1 Geo. I. st. 2. c. 10. which enacts that all churches, curacies, and chapels augmented by queen Anne's bounty shall become perpetual cures and benefices, had thereby brought them under the statute of pluralities, so as to produce the avoidance of other livings. But to remove all doubts upon that subject the 36 Geo. III. c. 83. has declared that such augmented churches and chapels shall be considered as presentative benefices, and that the license to them shall render other livings voidable in the same manner as institution to presentative benefices: but that every clergyman should continue in quiet possession of any benefices which he held in conjunction with such augmented cures before the passing of that act, viz. 14th May 1796.

(34) The number of the chaplains of the king and royal family, who may have dispensations, is unlimited. An archbishop may have eight, a duke and bishop six, a marquis and earl five, a viscount four; the chancellor, a baron, and knight of the garter three; a dutchess, marchioness, countess, and baroness, being widows, two; the king's treasurer, comptroller, secretary, dean of the chapel, amner, and the master of the rolls, two; the chief justice of king's bench, and warden of cinque ports, one. These chaplains only can obtain a dispensation under the statute.

If one person has two or more of these titles or characters united in himself, he can only retain the number of chaplains limited to his highest degree; and if a nobleman retain his full number of chaplains, no one of them can be discharged, so that another shall be appointed in

knights (35), and doctors and bachelors of divinity and law (36), *admitted by the universities* of this realm. And a vacancy thus made, for want of a dispensation, is called cession (37). 3. By consecration; for, as was mentioned [393] before [q], when a clerk is promoted to a bishoprick, all his other preferments are void the instant that he is consecrated. But there is a method, by the favor of the crown, of holding such livings *in commendam*. *Commenda*,

[q] page 383.

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his room during his life. 4 *Co.* 90. The king may present his own chaplains, *i. e.* waiting chaplains in ordinary, to any number of livings in the gift of the crown, and even in addition to what they hold upon the presentation of a subject without dispensation: but a king's chaplain being beneficed by the king, cannot afterwards take a living from a subject, but by a dispensation according to the statute 21 Hen. VIII. *c.* 13. *s.* 29. 1 *Salk.* 161.

(35) This privilege is not enjoyed by the brother and son of a baronet, for the rank of baronet did not then exist.

(36) The words of the statute are, "all doctors and bachelors of divinity, doctors of laws, and bachelors of the law canon." Before the reformation, degrees were as frequent in the canon law as in the civil law. Many were graduates *in utroque jure*, or *utriusque juris*. J. U. D. or *juris utriusque doctor*, is still common in foreign universities. But Hen. VIII. in the 27th year of his reign, when he had renounced the authority of the pope, issued a mandate to the university of Cambridge, *ut nulla legatur palam et publice lectio in jure canonico sive pontificio, nec aliquis cujuscunque conditionis homo gradum aliquem in studio illius juris pontificii suscipiat, aut in eodem in posterum promoveatur quovis modo.* Stat. Acad. Cant. p. 137. It is probable that, at the same time, Oxford received a similar prohibition, and that degrees in canon law have ever since been discontinued in England.

(37) In the case of a cession under the statute, the church is so far void upon institution to the second living, that the patron may take notice of it, and present if he pleases: but there is great reason to think, that lapse will not incur from the time of institution against the patron, unless notice be given him; but lapse will incur from the time of induction without notice. 2 *Wils.* 200. 3 *Burr.* 1504.

or *ecclesia commendata*, is a living commended by the crown to the care of a clerk, to hold till a proper pastor is provided for it. This may be temporary for one, two, or three years; or perpetual: being a kind of dispensation to avoid the vacancy of the living, and is called a *commenda retinere* (38). There is also a *commenda recipere*, which is to take a benefice *de novo*, in the bishop's own gift, or the gift of some other patron consenting to the same; and this is the same to him as institution and induction are to another clerk[q]. 4. By resignation. But this is of no avail, till accepted by the ordinary; into whose hands the resignation must be made[r] (39). 5. By deprivation, either, first, by sentence declaratory in the

q Hob. 144. r Cro. Jac. 198.

(38) These commendams are now seldom or never granted to any but bishops; and in that case, the bishop is made commendatory of the benefice, while he continues bishop of such a diocese, as the object is to make it an addition to a small bishoprick; and it would be unreasonable to grant it to a bishop for his life, who might be translated afterwards to one of the richest sees. See an account of the proceedings in the great case of commendams, *Hob.* 140. and *Collier's Ec. Hist.* 2 vol. p. 710.

(39) It seems to be clear that the bishop may refuse to accept a resignation, upon a sufficient cause for his refusal; but whether he can merely at his will and pleasure refuse to accept a resignation without any cause, and who shall finally judge of the sufficiency of the cause, and by what mode he may be compelled to accept, are questions undecided. In the case of the bishop of London and Fytche, the judges in general declined to answer whether a bishop was compellable to accept a resignation: one thought he was compellable by *mandamus*, if he did not shew sufficient cause; and another observed, if he could not be compelled, he might prevent any incumbent from accepting an Irish bishoprick, as no one can accept a bishoprick in Ireland till he has resigned all his benefices in England. But lord Thurlow seemed to be of opinion that he could not be compelled, particularly by *mandamus*, from which there is no appeal or writ of error. See 3 *Burn.* 304. and the opinions of the judges in *Cunningham's Law of Simony*, though ill reported.

ecclesiastical courts, for fit and sufficient causes allowed by the common law; such as attainder of treason or felony[s], or conviction of other infamous crime in the king's courts; for heresy, infidelity[t], gross immorality, and the like: or, secondly, in pursuance of divers penal statutes, which declare the benefice void, for some nonfeasance or neglect, or else some malefeasance or crime; as, for simony[v]; for maintaining any doctrine in derogation of the king's supremacy, or of the thirty-nine articles, or of the book of common prayer[u]; for neglecting after institution to read the liturgy and articles in the church, or make the declarations against popery, or take the abjuration oath[w]; for using any other form of prayer than the liturgy of the church of England[x]; or for absenting himself sixty days in one year from a benefice belonging to a popish patron, to which the clerk was presented by either of the universities[y]; in all which, and similar cases[z] the benefice is *ipso facto* void, without any formal sentence of deprivation.

VI. A CURATE is the lowest degree in the church; being in the same state that a vicar was formerly, an officiating temporary minister, instead of the proper incumbent. [394] Though there are what are called *perpetual* curacies, where all the tithes are appropriated, and no vicarage endowed, (being for some particular reasons[a] exempted from the statute of Hen. IV.) but, instead thereof, such perpetual curate is appointed by the appropriator. With regard to the other species of curates, they are the objects of some particular statutes, which ordain, that such as serve a church during its vacancy shall be paid such stipend as the ordinary thinks reasonable, out of the profits of the vacancy; or, if that be not sufficient, by the successor within fourteen

s Dyer. 108. Jenk. 210.
t Fitz. Abr. t. Trial. 54.
v Stat. 31 Eliz. c. 6. 12 Ann. c. 12.
u Stat. 1 Eliz. c. 1 and 2. 13 Eliz. c. 12. 1 Geo. I. c. 6.
w Stat. 13 Eliz. c. 12. 14 Car. II. c. 4.
x Stat. 1 Eliz. c. 2.
y Stat. 1 W. and M. c. 26.
z 6 Rep. 29, 30.
a 1 Burn. eccl. law. 427.

days after he takes possession [a]: and that, if any rector or vicar nominates a curate to the ordinary to be licensed to serve the cure in his absence, the ordinary shall settle his stipend under his hand and seal, not exceeding 50*l.* *per annum*, nor less than 20*l.* and on failure of payment may sequester the profits of the benefice [b] (40).

a Stat. 28 Hen. VIII. c. 11. b Stat. 12 Ann. st. 2. c. 12.

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(40) It was provided in 1603, by canon 33, that if a bishop ordains any person not provided with some ecclesiastical preferment, except a fellow or chaplain of a college, or a master of arts of five years standing, who lives in the university at his own expense, he shall support him till he shall prefer him to a living. 3 *Burn. Ec. L.* 28. And the bishops, before they confer orders, require either proof of such a title as is described by the canon, or a certificate from some rector or vicar, promising to employ the candidate for orders *bona fide* as a curate, and to grant him a certain allowance, till he obtains some ecclesiastical preferment, or shall be removed for some fault. And in a case where the rector of St. Ann's, Westminster, gave such a title, and afterwards dismissed his curate without assigning any cause, the curate recovered, in an action of assumpsit, the same salary for the time after his dismission which he had received before. *Cowp.* 437. And when the rector had vacated St. Ann's, by accepting the living of Rochdale, the curate brought another action to recover his salary since the rector left St. Ann's; but lord Mansfield and the court held, that that action could not be maintained, and that these titles are only binding upon those who give them, while they continue incumbent in the church for which such curate is appointed. *Doug.* 137.

The 36 Geo. III. c. 83. has given a power to the bishop or ordinary to grant an allowance not exceeding 75*l.* to any curate, who shall be *employed* by any rector or vicar, or by any curate or incumbent of any church or chapel, which has been augmented by queen Ann's bounty, or by the curate or incumbent of any perpetual curacy, although it has not been so augmented.

And where a rector or vicar does not reside four months in the year at least, the bishop or ordinary may grant the use of the rectory or vicarage house with the garden and stable for one year to the curate for his actual residence in it. Or he may grant him 15*l.* a year in lieu

THUS much of the clergy, properly so called. There are also certain inferior ecclesiastical officers of whom the common law takes notice; and that, principally, to assist the ecclesiastical jurisdiction, where it is deficient in powers. On which officers I shall make a few cursory remarks.

VII. CHURCHWARDENS are the guardians or keepers of the church, and representatives of the body of the parish[c]. They are sometimes appointed by the minister, sometimes by the parish, sometimes by both together, as custom directs. They are taken, in favor of the church, to be for some purposes a kind of corporation at the common law; that is, they are enabled by that name to have a property in goods and chattels, and to bring actions for them, for the use and profit of the parish. Yet they may not waste the church goods, but may be removed by the parish, and then called to account by action at the common law; but there is no method of calling them to account, but by first removing them; for none can legally do it, but those who are put in their place. [395] As to lands, or other real property, as the church, church-yard, &c. they have no sort of interest therein; but if any damage is done thereto, the parson only or vicar shall have the action. Their office also is to repair the church, and make rates and levies for that purpose:

c In Sweden they have similar officers, whom they call *klarckiewariander*. Stiernhook. l. 3. c. 1.

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of the rectory or vicarage house. The grant of the house he has power to renew, and at any time he may revoke it, and he may annex to it such conditions as he shall think reasonable. If the curate refuses to give up possession at the determination of the grant, he shall forfeit to his rector or vicar all the stipend, which shall be or become due to him, and 50*l.* besides. And the ordinary has power to license any curate, who shall be employed by any rector, vicar, or other incumbent of a parish church or chapel, although no nomination shall have been made to him for that purpose; or he may revoke his license, or remove any curate for a reasonable cause, but subject to an appeal to the archbishop of the province, to be determined in a summary manner.

but these are recoverable only in the ecclesiastical court. They are also joined with the overseers in the care and maintenance of the poor. They are to levy[d] a shilling forfeiture on all such as do not repair to church on sundays and holidays, and are empowered to keep all persons orderly while there; to which end it has been held that a churchwarden may justify the pulling off a man's hat, without being guilty of either an assault or trespass[e]. There are also a multitude of other, petty parochial powers committed to their charge by divers acts of parliament[f].

VIII. PARISH clerks and sextons are also regarded by the common law, as persons who have freeholds in their offices; and therefore though they may be punished, yet they cannot be deprived, by ecclesiastical censures[g]. The parish clerk was formerly very frequently in holy orders, and some are so to this day. He is generally appointed by the incumbent, but by custom may be chosen by the inhabitants; and if such custom appears, the court of king's bench will grant a *mandamus* to the archdeacon to swear him in, for the establishment of the custom turns it into a temporal or civil right[h].

d Stat. 1 Eliz. c. 2.
e 1 Lev. 196.
f See Lambard of churchwardens, at the end of his *eirenarcha*; and Dr. Burn, tit. *church, churchwardens, visitations.*
g 2 Roll. Abr. 234.
h Cro. Car. 589.

CHAPTER THE TWELFTH.

OF THE CIVIL STATE.

THE lay part of his majesty's subjects, or such of the people as are not comprehended under the denomination of clergy, may be divided into three distinct states, the civil, the military, and the maritime.

THAT part of the nation which falls under our first and most comprehensive division, the civil state, includes all orders of men from the highest nobleman to the meanest peasant, that are not included under either our former division, of clergy, or under one of the two latter, the military and maritime states: and it may sometimes include individuals of the other three orders; since a nobleman, a knight, a gentleman, or a peasant, may become either a divine, a soldier, or a seaman.

THE civil state consists of the nobility and the commonalty. Of the nobility, the peerage of Great Britain, or lords temporal, as forming (together with the bishops) one of the supreme branches of the legislature, I have before sufficiently spoken: we are here to consider them according to their several degrees, or titles of honor.

ALL degrees of nobility and honor are derived from the king as their fountain[a]: and he may institute what new titles he pleases. Hence it is that all degrees of nobility are not of equal antiquity. Those now in use are dukes, marquesses, earls, viscounts, and barons[b].

a 4 Inst. 363.

b For the original, of these titles on the continent of Europe, and their subsequent introduction into this island, see Mr. Selden's *titles of honor*.

1. A *duke*, though he be with us, in respect of his title of nobility, inferior in point of antiquity to many others, yet is superior to all of them in rank; his being the first title of dignity after the royal family[c]. Among the Saxons [397] the Latin name of dukes, *duces*, is very frequent, and signified, as among the Romans, the commanders or leaders of their armies, whom in their own language they called *ealdormen*[d]; and in the laws of Henry I. (as translated by Lambard) we find them called *heretochii*. But after the Norman conquest, which changed the military polity of the nation, the kings themselves continuing for many generations *dukes* of Normandy, they would not honor any subjects with the title of duke, till the time of Edward III; who, claiming to be king of France, and thereby losing the ducal in the royal dignity (1), in the eleventh year of his reign created his son, Edward the black prince, duke of Cornwall: and many, of the royal family especially, were afterwards raised to the like honor. However, in the reign of queen Elizabeth, *A. D.* 1572[e], the whole order became utterly extinct; but it was revived about fifty years afterwards by her successor, who was remarkably prodigal of honors, in the person of George Villiers duke of Buckingham.

c Camden. Britan. *tit. ordines.*

d This is apparently derived from the same root as the German *herzog*, the ancient appellation of dukes in that country. Seld. tit. hon. 2. 1. 12.

e Camden. Britan. *tit. ordines.* Spelman, Gloss. 191.

(1) This reason is not very satisfactory, and, in fact, this order of nobility was created before Edward assumed the title of king of France. Dr. Henry, in his excellent history of England, informs us, that "about a year before Edward III. assumed the title of king "of France, he introduced a new order of nobility, to inflame the "military ardor and ambition of his earls and barons, by creating his "eldest son prince Edward duke of Cornwall. This was done with "great solemnity in full parliament at Westminster, March 17, *A. D.* "1337." *Hen. Hist.* 8 vol. 135. 8vo. edition. See *ante*, p. 224, note 10.

2. A *marquess*, *marchio*, is the next degree of nobility. His office formerly was (for dignity and duty were never separated by our ancestors) to guard the frontiers and limits of the kingdom; which were called the marches, from the teutonic word, *marche*, a limit: such as, in particular, were the marches of Wales and Scotland, while each continued to be an enemy's country. The persons, who had command there, were called lords marchers, or marquesses; whose authority was abolished by statute 27 Hen. VIII. c. 27: though the title had long before been made a mere ensign of honor; Robert Vere, earl of Oxford, being created marquess of Dublin, by Richard II. in the eighth year of his reign [f].

[398] 3. An *earl* is a title of nobility so ancient, that its original cannot clearly be traced out. Thus much seems tolerably certain: that among the Saxons they are called *ealdormen*, *quasi* elder men, signifying the same as *senior* or *senator* among the Romans; and also *schiremen*, because they had each of them the civil government of a several division or shire. On the irruption of the Danes, they changed the name to *eorles*, which, according to Camden [g], signified the same in their language. In Latin they are called *comites* (a title first used in the empire) from being the king's attendants; "*a socie-*"*tate nomen sumpserunt, reges enim tales sibi associant* [h]." After the Norman conquest they were for some time called *counts* or *countees*, from the French; but they did not long retain that name themselves, though their shires are from thence called counties to this day. The name of *earls* or *comites* is now become a mere title, they having nothing to do with the government of the county; which, as has been more than once observed, is now entirely devolved on the sheriff, the earl's deputy, or *vice-comes*. In writs and commissions, and other formal instruments, the king, when he mentions any peer of the degree of an earl, usually styles him, "trusty and well beloved "*cousin*:" an appellation as ancient as the reign of Henry IV: who being either by his wife, his mother, or his

f 2 Inst. 5.
g Britan. *tit. ordines.*
h Bracton. l. 1. c. 8. Flet. l. 1. c. 5.

sisters, actually related or allied to every earl then in the kingdom, artfully and constantly ackowledged that connection in all his letters and other public acts: from whence the usage has descended to his successors, though the reason has long ago failed.

4. The name of *vice-comes* or *viscount* (2) was afterwards made use of as an arbitrary title of honor, without any shadow of office pertaining to it, by Henry the sixth; when, in the eighteenth year of his reign, he created John Beaumont a peer, by the name of viscount Beaumont, which was the first instance of the kind[i].

5. A *baron's* is the most general and universal title of nobility; for originally every one of the peers of superior rank had also a barony annexed to his other titles[k] (3). But

i 2 Inst. 5. k 2 Inst. 5, 6.

(2) These Latin and French words are the same as sheriff in English. This proves the high respect that was shewn to this officer in ancient times, for his name alone was thought an honorable title of nobility. See note 8. p. 346.

(3) At the time of the conquest, the temporal nobility consisted only of earls and barons; and by whatever right the earls and the mitred clergy before that time might have attended the great council of the nation, it abundantly appears that they afterwards sat in the feudal parliament in the character of barons. It has been truly said, that, for some time after the conquest, wealth was the only nobility, as there was little personal property at that time, and a right to a seat in parliament was entirely territorial, or depended upon the tenure of landed property. Ever since the conquest, it has been true, that all land is held either immediately or mediately of the king; that is, either of the king himself, or of a tenant of the king, or it might be after two or more subinfeudations. And it was also a general principle in the feudal system, that every tenant of land, or land owner, had both a right and obligation to attend the court of his immediate superior. Hence every tenant *in capite*, i. e. the tenant of the king, was at the same time entitled and bound to attend the king's court or parliament, being the great court baron of the nation.

it hath sometimes happened that when an ancient baron hath been raised to a new degree of peerage, in the course of a

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It will not be necessary for me here to enlarge farther upon the original principles of the feudal system, and upon the origin of peerage; but I shall briefly abridge the account which Selden has given in the second part of his Titles of Honor, c. 5. beginning at the 17th section, being perhaps the clearest and most satisfactory that can be found. He divides the time from the conquest into three periods: 1. From the conquest to the latter end of the reign of king John. 2. From that time to the 11th of Richard II. 3. From that period to the time he is writing, which may now be extended to the present time. In the first period, all, who held any quantity of land of the king, had, without distinction, a right to be summoned to parliament; and this right being confined solely to the king's tenants, of consequence all the peers of parliament during that period sat by virtue of tenure and a writ of summons.

In the beginning of the second period, that is, in the last year of the reign of king John, a distinction, very important in its consequences, (for it eventually produced the lower house of parliament,) was introduced, *viz.* a division of these tenants into greater and lesser barons: for king John in his *magna charta* declares, *faciemus summoneri archiepiscopos, episcopos, abbates, comites, et majores barones regni sigillatim per literas nostras, et præterea faciemus summoneri in generali per vicecomites et ballivos nostros omnes alios, qui in capite tenent de nobis ad certum diem, &c.* See Bl. Mag. Ch. Joh. p. 14. It does not appear that it ever was ascertained what constituted a greater baron, and it probably was left to the king's discretion to determine; and no great inconvenience could have resulted from its remaining indefinite, for those who had not the honor of the king's letter, would have what in effect was equivalent, a general summons from the sheriff. But in this second period tenure began to be disregarded, and persons were summoned to the parliament by writ, who held no lands of the king. This continued to be the case till the 11th of Rich. II. when the practice of creating peers by letters patent first commenced.

In that year John de Beauchamp, steward of the household to Rich. II. was created by patent lord Beauchamp baron of Kidderminster in tail male; and since that time peerages have been created both by writ and patent, without any regard to tenure or estate.

few generations the two titles have descended differently; one perhaps to the male descendants, the other to the heirs general; whereby the earldom or other superior title hath subsisted without a barony: and there are also modern instances, where earls and viscounts have been created without annexing a barony to their other honors: so that now the rule doth not hold universally, that all peers are barons. The original and antiquity of baronies have occasioned great inquiries among our English antiquaries. The most probable opinion seems to be, that they were the same with our present lords of manors; to which the name of court baron (which is the lord's court, and incident to every manor) gives some countenance (4). It may be collected from king John's *magna carta*[1], that originally all lords of manors, or barons, that held of the king *in capite*, had seats in the great council or parliament: till about the reign of that prince the conflux of them became so large and troublesome, that the king was

1 cap. 14.

The king's prerogative of creating peers by patent may seem a great innovation, or a violation of the original principles of the system; yet it is one of those great changes, which are produced at the first by a gentle deviation from the former practice. For though this prerogative was not granted to the king by the express authority of parliament, yet it was obtained by its acquiescence; for I have been assured by Mr. Townshend, the Windsor herald, a gentleman well acquainted with this subject, that patents of nobility in ancient times generally stated, either that the patent was granted by the assent of parliament, or, if granted in the vacation, they stated such special reasons why the peer was created, as it might be presumed would afterwards meet with the approbation of the parliament.

(4) Lords of manors, who had granted to others by subinfeudation part of that estate which they held of the king, would necessarily be barons; but it does not follow conversely that a baron was of necessity a lord of a manor: for the king's tenant, who retained all the estate granted him, and alienated no part of it, would certainly be as complete a baron as a lord of a manor.

obliged to divide them, and summon only the greater barons in person; leaving the small ones to be summoned by the sheriff, and (as it is said) to sit by representation in another house; which gave rise to the separation of the two houses of parliament[m]. By degrees the title came to be confined to the greater barons, or lords of parliament only; and there were no other barons among the peerage but such as were summoned by writ, in respect of the tenure of their lands or baronies, till Richard the second first made it a mere title of honor, by conferring it on divers persons by his letters patent[n].

HAVING made this short inquiry into the original of our several degrees of nobility, I shall next consider the manner in which they may be created. The right of peerage seems to have been originally territorial; that is, annexed to lands, honors, castles, manors, and the like, the proprietors [400] and possessors of which were (in right of those estates) allowed to be peers of the realm, and were summoned to parliament to do suit and service to their sovereign: and, when the land was alienated, the dignity passed with it as appendant. Thus the bishops still sit in the house of lords in right of succession to certain ancient baronies annexed, or supposed to be annexed, to their episcopal lands[o]: and thus, in 11 Hen. VI, the possession of the castle of Arundel was adjudged to confer an earldom on its possessor[p]. But afterwards, when alienations grew to be frequent, the dignity of peerage was confined to the lineage of the party ennobled, and instead of territorial became personal. Actual proof of a tenure by barony became no longer necessary to constitute a lord of parliament; but the record of the writ of summons to him or his ancestors was admitted as a sufficient evidence of the tenure.

PEERS are now created either by writ, or by patent: for those who claim by prescription must suppose either a writ or

m Gilb. hist. of exch. c. 3. Seld. tit. of hon. 2. 5. 21.
n 1 Inst. 9. Seld. *Jan. Angl.* 2. sec. 66.
o Glan. l. 7. c. 1.
p Seld. tit. of hon. b. 2. c. 9. sec. 5.

patent made to their ancestors; though by length of time it is lost. The creation by writ, or the king's letter, is a summons to attend the house of peers, by the style and title of that barony, which the king is pleased to confer: that by patent is a royal grant to a subject of any dignity and degree of peerage. The creation by writ is the more ancient way; but a man is not ennobled thereby, unless he actually take his seat in the house of lords: and some are of opinion that there must be at least two writs of summons, and a sitting in two distinct parliaments, to evidence an hereditary barony[q]: and therefore the most usual, because the surest, way is to grant the dignity by patent, which enures to a man and his heirs according to the limitations thereof, though he never himself makes use of it[r]. Yet it is frequent to call up the eldest son of a peer to the house of lords by writ of summons, in the name of his father's barony: because in that case there is no danger of his children's losing the nobility in case he never takes his seat; for they will succeed to their grandfather (5). Creation by writ has also one advantage over that by patent: for a person [401] created by writ holds the dignity to him *and his heirs*, without any words to that purport in the writ (6); but in

q Whitelocke of parl. ch. 114. r Co. Litt. 16.

(5) And where the father's barony is limited by patent to him and the heirs male of his body, and his eldest son is called up to the house of lords by writ with the title of this barony, the writ in this case will not create a fee or a general estate tail, so as to make a female capable of inheriting the title, but upon the death of the father the two titles unite, or become one and the same. Case of the claim to the barony of Sidney of Penshurst disallowed. *Dom. Proc.* 17 *June* 1782.

(6) Though this is the authority of lord Coke, it is now understood to be erroneous; a creation by writ does not confer a fee-simple in the title, but only an estate tail general; for every claimant of the title must be descended from the person first ennobled. 1 *Woodd.* 37.

letters patent there must be words to direct the inheritance, else the dignity enures only to the grantee for life[s]. For a man or woman may be created noble for their own lives, and the dignity not descend to their heirs at all, or descend only to some particular heirs: as where a peerage is limited to a man, and the heirs male of his body by Elizabeth his present lady, and not to such heirs by any former or future wife.

Let us next take a view of a few of the principal incidents attending the nobility, exclusive of their capacity as members of parliament, and as hereditary counsellors of the crown; both of which we have before considered. And first we must observe, that in criminal cases a nobleman shall be tried by his peers (7). The great are always obnoxious to popular envy: were they to be judged by the people, they might be in danger from the prejudice of their judges; and would moreover be deprived of the privilege of the meanest subjects, that of being tried by their equals, which is secured to all the realm by *magna carta*, c. 29. It is said, that this does not extend to bishops: who, though they are lords of parliament, and sit there by virtue of their baronies which they hold *jure ecclesiae*, yet are not ennobled in blood (8), and consequently not peers with the nobility[t]. As to peeresses there

[s] Co. Litt. 9. 16. [t] 3 Inst. 30, 31.

(7) A nobleman is tried by his peers only in treason and felony, and misprision of the same; but in all misdemeanors, as libels, riots, perjury, conspiracies, &c. he is tried like a commoner by a jury. 3 *Inst.* 30. 2 *Hawk.* 424.

(8) It has always appeared to me that the reason given in the books, why bishops should not be tried in parliament like the temporal lords, *viz.* because they are not ennobled by blood, or, as Selden expresses it, because their honor is not inheritable (*Jud. in Parl.* c. 1.), is unsatisfactory and even trifling.

If this reason has any operation, why should it not be extended, and deprive them of all the rights of peerage? A peer may be

was no precedent for their trial when accused of treason or felony, till after Eleanor dutchess of Gloucester, wife to the lord protector, was accused of treason and found guilty of witchcraft, in an ecclesiastical synod, through the intrigues of cardinal Beaufort. This very extraordinary trial gave occasion to a special statute, 20 Hen. VI. c. 9. which declares[s] the law to be, that peeresses, either in their own right or by marriage, shall be tried before the same judicature as other peers of the realm. If a woman, noble in her own right, marries a commoner, she still remains noble (9), and shall be tried by her peers: but if she be only noble by marriage, then by a second marriage with a commoner, she loses her dignity; for as by marriage it is gained, by marriage it is also lost[t] (10). Yet if a dutchess dowager marries a baron, she

[s] Moor. 769. 2 Inst. 50, 6 Rep. 52. Staundf. P. C. 152. [t] Dyer. 79. Co. Litt. 16.

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created by patent for his own life only; and it cannot be supposed that such a nobleman would not be entitled to a trial by his peers in parliament. If there were any trials of bishops by a jury in remote times, the bishops could not have demanded a trial in parliament without admitting themselves subject to a temporal jurisdiction, from which the clergy in ancient times claimed a total exemption. Hence it may be conjectured the bishops have lost their right to be tried in parliament, though only two instances can be found of their being tried by a jury, *viz.* those of arch-bishop Cranmer and bishop Fisher. 2 *Hawk.* 596.

(9) But she communicates no rank or title to her husband. *Harg. Co. Litt.* 326. *b.* There have been claims, and these are supported by authorities, by a husband after issue to assume the title of his wife's dignity, and after her death to retain the same as tenant by the courtesy; but from Mr. Hargrave's statement of this subject, in *Co. Litt.* 29. *b.* n. 1. there is no probability that such a claim would now be allowed.

(10) Yet she is commonly called and addressed by the style and title which she bore before her second marriage, but this is only by courtesy; as the daughters of dukes, marquisses, and earls are usually

continues a dutchess still; for all the nobility are *pares*, and therefore it is no degradation[u]. A peer, or peeress, (either in her own right or by marriage,) cannot be arrested in civil cases[v]: and they have also many peculiar privileges annexed to their peerage in the course of judicial proceedings. A peer, sitting in judgment, gives not his verdict upon oath, like an ordinary juryman, but upon his honor[w]: he answers also to bills in chancery upon his honor, and not upon his oath[x]; but when he is examined as a witness either in civil or criminal cases, he must be sworn[y] (11): for the respect, which the law shews to the honor of a peer, does not extend so far as to overturn a settled maxim, that *in judicio non creditur nisi juratis*[z]. The honor of peers is however so highly tendered by the law, that it is much more penal to spread false reports of them and certain other great officers of the realm, than of other men: scandal against them being called by the peculiar name of *scandalum magnatum*, and subjected to peculiar punishments by divers ancient statutes[a].

A PEER cannot lose his nobility but by death or attainder; though there was an instance in the reign of Edward

u 2 Inst. 50.
v Finch. L. 355. 1 Vent. 298.
w 2 Inst. 49.
x 1 P. Wms. 146.
y Salk. 512.
z Cro. Car. 64.
a 3 Edw. I. c. 34. 2 Ric. II. st. 1. c. 5. 12 Ric. II. c. 11.

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addressed by the title of lady, though in law they are commoners. In a writ of partition brought by Ralph Haward and lady Ann Powes his wife, the court held that it was a misnomer, and that it ought to have been by Ralph Haward and Ann his wife, late wife of lord Powes deceased. *Dyer*, 79.

(11) If he is examined as a witness in the high court of parliament, he must be sworn. The bishop of Oxford was sworn in the impeachment of lord Macclesfield, and lord Mansfield (then lord Stormont) in that of Mr. Hastings.

the fourth of the degradation of George Nevile duke of Bedford, by act of parliament[b], on account of his poverty, which rendered him unable to support his dignity[c]. But this is a singular instance: which serves at the same time, by having happened, to shew the power of parliament; and, by having happened but once, to shew how tender the parliament hath been, in exerting so high a power. It hath been said indeed[d], that if a baron wastes his estate, so that he is not able to support the degree, the *king* may degrade him: but it is expressly held by later authorities[e], that a peer cannot be degraded but by act of *parliament*.

THE commonalty, like the nobility, are divided [403] into several degrees; and, as the lords, though different in rank, yet all of them are peers in respect of their nobility, so the commoners, though some are greatly superior to others, yet all are in law peers, in respect of their want of nobility[f].

THE first name of dignity, next beneath a peer, was anciently that of *vidames*, *vice-domini*, or *valvasors*[g]: who are mentioned by our ancient lawyers[h] as *viri magnae dignitatis*; and sir Edward Coke[i] speaks highly of them. Yet they are now quite out of use; and our legal antiquaries are not agreed upon even their original or ancient office.

Now therefore the first personal dignity, after the nobility, is a *knight* of the order of St. George, or *of the garter*: first instituted by Edward III, *A. D.* 1344[k]. Next (but not till after certain *official* dignities, as privy counsellors,

b 4 Inst. 355.

c The preamble to the act is remarkable; "forasmuch as oftentimes it is seen, that "when any lord is called to high estate, and "hath not convenient livelihood to support "the same dignity, it induceth great poverty "and indigence, and causeth oftentimes great "extortion, embracery, and maintenance to "be had; to the great trouble of all such "countries where such estate shall happen "to be; therefore, etc."

d Moor, 678.

e 12 Rep. 107. 12 Mod. 56.

f 2 Inst. 29.

g Camden. *Britan. t. ordines.*

h Bracton. l. 1. c. 8.

i 2 Inst. 667.

k Seld. tit. of hon. 2. 5. 41.

the chancellors of the exchequer and dutchy of Lancaster, the chief justice of the king's bench, the master of the rolls, and the other English judges) follows a *knight banneret;* who indeed by statutes 5 Ric. II. st. 2. c. 4. and 14 Ric. II. c. 11. is ranked next after barons; and his precedence before the younger sons of viscounts was confirmed to him by order of king James I, in the tenth year of his reign[l]. But, in order to entitle himself to this rank, he must have been created by the king in person, in the field, under the royal banners, in time of open war[m]. Else he ranks after *baronets;* who are the next order; which title is a dignity of inheritance, created by letters patent, and usually descendible to the issue male. It was first instituted by king James the first, *A. D.* 1611, in order to raise a competent sum for the reduction of the province of Ulster in Ireland (12); for which reason all [404] baronets have the arms of Ulster superadded to their family coat (13). Next follow *knights of the bath;* an order instituted by king Henry IV. and revived by king George the first. They are so called from the ceremony of bathing, the night before their creation. The last of these inferior nobility are *knights bachelors* (14); the most ancient, though the lowest order of knighthood

l Seld. tit. of hon. 2. 11. 3. m 4 Inst. 6.

(12) One hundred gentlemen advanced each one thousand pounds; for which this title was conferred upon them. 2 *Rap.* 185 *fo.*

(13) The arms of Ulster are, a hand *gules*, or a bloody hand in a field *argent.*

(14) The most probable derivation of the word bachelor is from *ba* and *chevalier*, an inferior knight; and thence latinized into the barbarous word *baccalaureus. Ducange. Bac.*

The lowest graduates in the universities are styled *bachelors*, and were, till lately, addressed with sir before their surname; as in Latin

amongst us: for we have an instance[n] of king Alfred's conferring this order on his son Athelstan. The custom of the ancient Germans was to give their young men a shield and a lance in the great council: this was equivalent to the *toga virilis* of the Romans: before this they were not permitted to bear arms, but were accounted as part of the father's household; after it, as part of the community[o]. Hence some derive the usage of knighting, which has prevailed all over the western world, since its reduction by colonies from those northern heroes. Knights are called in Latin *equites aurati: aurati*, from the gilt spurs they wore; and *equites*, because they always served on horseback: for it is observable[p], that almost all nations call their knights by some appellation derived from an horse (15). They are also called in our law *milites*, because they formed a part of the royal army, in virtue of their feodal tenures; one condition of which was, that every one who held a knight's fee immediately under the crown (which in Edward the second's time[q] amounted to 20*l. per annum*) was obliged to be knighted, and attend the king in his wars, or fine for his non-compliance. The exertion of this prerogative, as an expedient to raise money in the reign of Charles the first, gave great offence: though warranted by law, and the recent example of queen Elizabeth (16):

n Will. Malmsb. lib. 2.
o Tac. *de Morib. Germ.* 13.
p Camd. ibid. Co. Litt. 74.
q Stat. *de milit.* 1 Ed. II.

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they are still called *domini*. It is somewhat remarkable, that whilst this feudal word has long been appropriated to single men, another feudal term of higher dignity, *viz.* baron, should, in legal language, be applied to those who are married.

(15) It does not appear that the English word *knight* has any reference to a horse; for knight, or cniht in the Saxon, signified *puer*, *servus*, or attendant. 2 *Seld. tit. hon. c. 5. s.* 33.

(16) Considerable fees accrued to the king upon the performance of the ceremony. Edward VI. and queen Elizabeth had appointed

but it was by the statute 16 Car. I. c. 16. abolished; and this kind of knighthood has, since that time, fallen into great disregard.

These, sir Edward Coke says[r], are all the names of *dignity* in this kingdom, esquires and gentlemen being only names of *worship*. But before these last the heralds [405] rank all colonels, serjeants at law, and doctors in the three learned professions[s].

r 2 Inst. 667.

s The rules of precedence in England may be reduced to the following table: in which those marked ¶ are entitled to the rank here allotted them, by statute 31 Hen. VIII. c. 10.——marked †, by statute 1 W. and M. c. 21.——marked ‖, by letters patent 9, 10, and 14 Jac. I. which see in Seld. tit. of Hon. II. 5. 46. and II. 11. 3.——marked ‡, by ancient usage and established custom; for which see (among others) Camden's Britannia, *tit. ordines*. Milles's catalogue of Honor, edit. 1610. and Chamberlayne's present state of England. b. 3. ch. 3.

TABLE OF PRECEDENCE.

¶ The king's children and grandchildren
¶ ..... brethren
¶ ..... uncles
¶ The king's nephews
¶ Archbishop of Canterbury (17)
¶ Lord chancellor or keeper, if a baron

commissioners to compound with all persons, who had lands to the amount of 40*l.* a year, and who declined the honor and expense of knighthood. Charles the first followed their example; upon which Mr. Hume artfully remarks, that "nothing proves more plainly, how "ill-disposed the people were to the measures of government, than to "observe, that they loudly complained of an expedient, founded on "positive statute, and warranted by such recent precedents." 6 Vol. 296.

(17) It is said, that before the conquest, by a constitution of pope Gregory, the two arch-bishops were equal in dignity, and in the number of bishops subject to their authority; and that William the conqueror thought it prudent to give precedence and superiority to the arch-bishop of Canterbury; but Thomas arch-bishop of York was unwilling to acknowledge his inferiority to Lanfranc arch-bishop of Canterbury, and appealed to the pope, who referred the matter to the king and barons; and in a council held at Windsor-castle, they decided in favor of the arch-bishop of Canterbury. *Godw. Comm. de Præsul.* 665.

Esquires and gentlemen are confounded together by sir Edward Coke, who observes[s], that every esquire is a gentleman, and a gentleman is defined to be one *qui arma gerit*, who bears coat armor, the grant of which adds gentility to a man's family: in like manner as civil nobility, among the Romans, was founded in the *jus imaginum*, or having the

¶ Archbishop of York
¶ Lord treasurer
¶ Lord president of the council } if barons
¶ Lord privy seal
¶ Lord great chamberlain. But see private stat. 1 Geo. I. c. 3. } above all peers of their own degree
¶ Lord high constable
¶ Lord marshall
¶ Lord admiral
¶ Lord steward of the household
¶ Lord chamberlain of the household
¶ Dukes
¶ Marquesses
‡ Dukes' eldest sons
¶ Earls
‡ Marquesses' eldest sons
‡ Dukes' younger sons
¶ Viscounts
‡ Earls' eldest sons
‡ Marquesses' younger sons
¶ Secretary of state, if a bishop
¶ Bishop of London
¶ ..... Durham
¶ ..... Winchester
¶ Bishops

¶ Secretary of state, if a baron
¶ Barons
† Speaker of the house of commons
† Lords commissioners of the great seal
‡ Viscounts' eldest sons
‡ Earls' younger sons
‡ Barons' eldest sons
‖ Knights of the garter
‖ Privy counsellors
‖ Chancellor of the exchequer
‖ Chancellor of the dutchy
‖ Chief justice of the king's bench
‖ Master of the rolls
‖ Chief justice of the common pleas
‖ Chief baron of the exchequer
‖ Judges, and barons of the coif
‖ Knights bannerets, royal
‖ Viscounts' younger sons
‖ Barons' younger sons
‖ Baronets
‖ Knights bannerets
‡ Knights of the bath
‡ Knights bachelors
‖ Baronets' eldest sons

s 2 Inst. 668.

But the arch-bishops of York long afterwards refused to acquiesce in this decision, for bishop Godwin relates a curious and ludicrous struggle, which took place in the reign of Hen. II. above one hundred years afterwards, between Roger arch-bishop of York, and Richard arch-bishop of Canterbury, for the chair on the right hand of the pope's legate. *Ib.* 79. Perhaps to this decision, and their former equality, we may refer the present distinction between them; *viz.* that the arch-bishop of Canterbury is primate of all England, and the arch-bishop of York is primate of England.

image of one ancestor at least, who had borne some curule office. It is indeed a matter somewhat unsettled, what constitutes the distinction, or who is a real *esquire*; for it is not an estate, however large, that confers this rank upon its owner. Camden, who was himself a herald, distinguishes them the most accurately; and he reckons up four sorts of them[t]: 1. The eldest sons of knights, and their eldest sons, in perpetual succession[u]. 2. The eldest sons of younger sons of peers, and their eldest sons in like perpetual succession: both which species of esquires sir Henry Spelman entitles *armigeri natalitii*[w]. 3. Esquires created by the king's letters patent, or other investiture (18); and their eldest sons. 4. Esquires by virtue of their offices: as justices of the peace, and others who bear any office of trust under the crown (19). To these may be added the esquires of knights

‖ Knights' eldest sons
‖ Baronets' younger sons
‖ Knights' younger sons
‡ Colonels
‡ Serjeants at law
‡ Doctors

‡ Esquires
‡ Gentlemen
‡ Yeomen
‡ Tradesmen
‡ Artificers
‡ Laborers

N. B. Married women and widows are entitled to the same rank among each other, as their husbands would respectively have borne between themselves, except such rank is merely professional or official; and unmarried women to the same rank as their eldest brothers would bear among men, during the lives of their fathers.

t 2 Inst. 668. u 2 Inst. 667. w Gloss. 43.

(18) This creation has long been disused. Esquires thus created were invested *calcaribus argentatis*, to distinguish them from the *equites aurati*. In the life of Chaucer, we are told that he was created scutifer to Edward III. Scutifer is the same as armiger; and our word esquire is derived from *scutum*, or the French *ecu* a shield.

(19) I cannot but think that this is too extensive a description of an esquire, for it would bestow that honor upon every excise-man and custom-house officer; it probably ought to be limited to

of the bath, each of whom constitutes three at his installation: and all foreign, nay, Irish peers; for not only these, but the eldest sons of peers of Great Britain, though frequently titular lords, are only esquires in the law, and must be so named in all legal proceedings[x] (20). As for *gentlemen*, says sir Thomas Smith[y], they be made good cheap in this kingdom: for whosoever studieth the laws of the realm, who studieth in universities, who professeth the liberal sciences, and (to be short) who can live idly, and without manual labor, and will bear the port, charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gentleman (21). A *yeoman* is he that hath free land of forty shillings by the year; who was anciently thereby qualified to

x 3 Inst. 30. 2 Inst. 667.
y Commonw. of Eng. b. 1. c. 20.

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those only who bear an office of trust under the crown, and who are styled esquires by the king in their commissions and appointments; and all I conceive who are once honored by the king with the title of esquire, have a right to that distinction for life.

(20) It is rather remarkable that the learned Judge should have forgotten to mention another class of esquires, viz. barristers. Sir Henry Spelman is of opinion that their claim to this title is founded in usurpation, for with some spleen he informs us, *certè altero hinc sæculo nominatissimus in patriâ jurisconsultus, ætate provectior, etiam munere gaudens publico et prædiis amplissimis, generosi titulo bene se habuit; fortè quod togatæ genti magis tunc conveniret civilis illa appellatio quam castrensis altera. Gloss. voc.* Arm. But this length of enjoyment has established such a right to this distinction, that the court of common pleas refused to hear an affidavit read, because a barrister named in it was not called an esquire. 1 *Wils.* 244.

(21) The eldest son has no prior claim to the degree of gentleman; for it is the text of Littleton, that "every son is as great a gentleman "as the eldest." *Sect.* 210.

serve on juries, vote for knights of the shire, and do any other act, where the law requires one that is *probus et legalis homo*[z].

THE rest of the commonalty are *tradesmen*, *artificers*, and *laborers*; who (as well as all others) must in pursuance of the statute 1 Hen. V. c. 5. be styled by the name and addition of their estate, degree, or mystery, and the place to which they belong, or where they have been conversant, in all original writs of actions, personal, appeals, and indictments, upon which process of outlawry may be awarded (22); in order, as it should seem, to prevent any clandestine or mistaken outlawry, by reducing to a specific certainty the person who is the object of its process (23).

z 3 Inst. 668.

(22) Informations in the nature of *quo warranto*, are not within the statute of additions. 1 *Wils.* 244.

(23) These are the ranks and degrees into which the people of England are divided, and which were created, and are preserved, for the reciprocal protection and support of each other. But to excite discontent, and to stir up rebellion against all good order and peaceful government, a proposition has lately been industriously propagated, *viz.* that all men are by nature equal. If this subject is considered even for a moment, the very reverse will appear to be the truth, and that all men are by nature unequal. For though children come into the world equally helpless, yet in a few years, as soon as their bodies acquire vigor, and their minds and passions are expanded and developed, we perceive an infinite difference in their natural powers, capacities, and propensities; and this inequality is still further increased by the instruction which they happen to receive.

Independent of any positive regulations, the unequal industry and virtues of men must necessarily create unequal rights. But it is said that all men are equal because they have an equal right to justice, or to the possession of their rights. This is a self-evident truth, which no one ever denied, and it amounts to nothing more than to the identical proposition, that all men have equal rights to their rights; for when different men have perfect and absolute rights to unequal things,

they are certainly equal with regard to the perfection of their rights, or the justice that is due to their respective claims. This is the only sense in which equality can be applied to mankind. In the most perfect republic that can be conceived in theory, the proposition is false and mischievous; the father and child; the master and servant, the judge and prisoner, the general and common soldier, the representative and constituent, must be eternally unequal, and have unequal rights.

And where every office is elective, the most virtuous and the best qualified to discharge the duties of any office, have rights and claims superior to others.

One celebrated philosopher has endeavoured to prove the natural equality of mankind, by observing, "that the weakest has strength "enough to kill the strongest, either by secret machinations, or by "confederacy with others, that are in the same danger with himself." *Hobbes's Lev.* c. xiii.

From such a doctrine, supported by such reasons, we cannot be surprised at the consequences, when an attempt is made to reduce it to practice.

Subordination in every society is the bond of its existence; the highest and the lowest individuals derive their strength and security from their mutual assistance and dependence; as in the natural body, *the eye cannot say to the hand, I have no need of thee; nor again, the head to the feet, I have no need of you.* Milton was so convinced of the necessity of subordination and degrees, that he makes Satan, even when warring against the king of heaven, address his legions thus:

> If not equal all, yet free,
> Equally free; for orders and degrees
> Jar not with liberty, but well consist. *B. 5. l. 790.*

True liberty results from making every higher degree accessible to those who are in a lower, if virtue and talents are there found to deserve advancement.

In this happy country, the son of the lowest peasant may rise by his merit and abilities to the highest stations in the church, law, army, navy, and in every department of the state. The doctrine, that all men are, or ought to be, equal, is little less contrary to nature, and destructive of their happiness, than the invention of Procrustes, who attempted to make men equal by stretching the limbs of some, and lopping off those of others.

But the experiment has been tried, and the result has hitherto been (an awful warning to the world) a rapid succession of assassinations, judicial murders, proscriptions, and usurpation.

Cetertm libertas et speciosa nomina prætexuntur; nec quisquam alienum servitium et dominationem sibi concupivit, ut non eadem ista vocabula usurparet. Tac. Hist. iv. c. 73.

CHAPTER THE THIRTEENTH.

OF THE MILITARY AND MARITIME STATES.

THE military state includes the whole of the soldiery; or, such persons as are peculiarly appointed among the rest of the people for the safeguard and defence of the realm.

IN a land of liberty it is extremely dangerous to make a distinct order of the profession of arms. In absolute monarchies this is necessary for the safety of the prince, and arises from the main principle of their constitution, which is that of governing by fear: but in free states the profession of a soldier, taken singly and merely as a profession, is justly an object of jealousy. In these no man should take up arms, but with a view to defend his country and its laws: he puts not off the citizen when he enters the camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while a soldier. The laws therefore and constitution of these kingdoms know no such state as that of a perpetual standing soldier, bred up to no other profession than that of war: and it was not till the reign of Henry VII, that the kings of England had so much as a guard about their persons.

In the time of our Saxon ancestors, as appears from Edward the confessor's laws[a], the military force of this kingdom was in the hands of the dukes or heretochs, who were constituted through every province and county in the kingdom; being taken out of the principal nobility, and such as were most remarkable for being "*sapientes, fideles, et animosi.*" Their duty was to lead and regulate the [409] English armies, with a very unlimited power; "*prout eis visum fuerit, ad honorem coronae et utilitatem regni.*" And because of this great power they were elected by the people in their full assembly, or folkmote, in the same manner as sheriffs were elected: following still that old fundamental maxim of the Saxon constitution, that where any officer was intrusted with such power, as if abused might tend to the oppression of the people, that power was delegated to him by the vote of the people themselves[b]. So too, among the ancient Germans, the ancestors of our Saxon forefathers, they had their dukes as well as kings, with an independent power over the military, as the kings had over the civil state. The dukes were elective, the kings hereditary: for so only can be consistently understood that passage of Tacitus[c], "*reges ex nobilitate, duces ex virtute sumunt;*" in constituting their kings, the family or blood royal was regarded; in choosing their dukes or leaders, warlike merit: just as Cæsar relates of their ancestors in his time, that whenever they went to war, by way either of attack or defence, they *elected* leaders to command them[d]. This large share of power, thus conferred by the people, though intended to perserve the liberty of the subject, was perhaps unreasonably detrimental to the prerogative of the crown: and accordingly we find a very ill use made of it by Edric duke of Mercia, in the reign

a *c. de heretochis.*

b "Isti vero viri eliguntur per commune "consilium, pro communi utilitate regni, per "provincias et patrias universas, et per sin"gulos comitatus, in pleno folkmote, sicut et "vicecomites, provinciarum et comitatuum "eligi debent." LL. Edw. Confess. ibid. See also Bede, *eccl. hist.* l. 5. c. 10.

c *De morib. Germ.* 7.

d "Quum bellum civitas aut illatum, defen"dit aut infert, magistratus qui ei bello prae"sint deliguntur." De bell. Gall. l. 6. c. 23.

of king Edmund Ironside; who, by his office of duke or heretoch, was entitled to a large command in the king's army, and by his repeated treacheries at last transferred the crown to Canute the Dane.

It seems universally agreed by all historians, that king Alfred first settled a national militia in this kingdom, and by his prudent discipline made all the subjects of his dominion soldiers: but we are unfortunately left in the dark as to the particulars of this his so celebrated regulation; though, from what was last observed, the dukes seem to have been left in possession of too large and independent a power: [410] which enabled duke Harold, on the death of Edward the confessor, though a stranger to the royal blood, to mount for a short space the throne of this kingdom, in prejudice of Edgar Atheling the rightful heir.

Upon the Norman conquest the feodal law was introduced here in all its rigor, the whole of which is built on a military plan. I shall not now enter into the particulars of that constitution, which belongs more properly to the next part of our commentaries; but shall only observe, that in consequence thereof all the lands in the kingdom were divided into what were called knights' fees, in number above sixty thousand (1): and for every knight's fee a knight or soldier, *miles*, was bound to attend the king in his wars, for forty days in a year (2); in which space of time, before war was reduced to a science, the campaign was generally finished, and a kingdom either conquered or victorious [e]. By this means the king had, without any expense, an army of sixty thousand men always ready at

[e] The Poles are, even at this day, so tenacious of their ancient constitution, that their pospolite, or militia, cannot be compelled to serve above six weeks, or forty days, in a year. Mod. Un. Hist. xxxiv. 12.

(1) 60,215.

(2) We frequently read of half a knight, or other aliquot part, as for so much land three knights and a half, &c. were to be returned; the fraction of a knight was performed by a whole knight who served half the time, or other due proportion of it.

his command. And accordingly we find one, among the laws of William the conqueror[f], which in the king's name commands and firmly enjoins the personal attendance of all knights and others; "*quod habeant et teneant se semper in armis* "*et equis, ut decet et oportet: et quod semper sint prompti et* "*parati ad servitium suum integrum nobis explendum et peragen-* "*dum, cum opus adfuerit, secundum quod debent de feodis et tene-* "*mentis suis de jure nobis facere.*" This personal service in process of time degenerated into pecuniary commutations or aids, and at last the military part (3) of the feodal system was abolished at the restoration, by statute 12 Car. II. c. 24.

In the mean time we are not to imagine that the kingdom was left wholly without defence in case of domestic insurrections, or the prospect of foreign invasions. Besides those, who by their military tenures were bound to perform forty [411] days service in the field, first the assize of arms, enacted 27 Hen. II[g], and afterwards the statute of Winchester[h], under Edward I, obliged every man, according to his estate and degree, to provide a determinate quantity of such arms as were then in use, in order to keep the peace: and constables were appointed in all hundreds by the latter statute, to see that such arms were provided. These weapons were changed by the statute 4 and 5 Ph. and M. c. 2. into others of more modern service: but both this and the former provisions were repealed in the reign of James I[i]. While these continued in force, it was usual from time to time for our princes to issue commissions of array, and send into every county officers in whom they could confide, to muster and array (or set in military order) the inhabitants of every district; and the

f c. 58. See Co. Litt. 75, 76.
g Hoved. A. D. 1181.
h 13 Edw. I. c. 6.
i Stat. 1 Jac. I. c. 25. 21 Jac. I. c. 28.

(3) The military or warlike part of the feudal system was abolished, when personal service was dispensed with for a pecuniary commutation, as early as the reign of Henry II. But the military tenures still remained till 12 Car. II. c. 24. See 2 vol. p. 77.

form of the commission of array was settled in parliament in the 5 Hen. IV, so as to prevent the insertion therein of any new penal clauses[k]. But it was also provided[l] that no man should be compelled to go out of the kingdom at any rate, nor out of his shire but in cases of urgent necessity; nor should provide soldiers unless by consent of parliament. About the reign of king Henry the VIII, or his children, lieutenants began to be introduced[m], as standing representatives of the crown, to keep the counties in military order; for we find them mentioned as known officers in the statute 4 & 5 Ph. & M. c. 3. though they had not been then long in use, for Camden speaks of them[n] in the time of queen Elizabeth, as extraordinary magistrates constituted only in times of difficulty and danger. But the introduction of these commissions of lieutenancy, which contained in substance the same powers as the old commissions of array, caused the latter to fall into disuse.

In this state things continued, till the repeal of the statutes of armor in the reign of king James the first: after which when king Charles the first had, during his northern expeditions, issued commissions of lieutenancy, and exerted some military powers, which, having been long exercised, were thought to belong to the crown, it became a question in the long parliament, how far the power of the militia did inherently reside in the king; being now unsupported [412] by any statute, and founded only upon immemorial usage. This question, long agitated, with great heat and resentment on both sides, became at length the immediate cause of the fatal rupture between the king and his parliament: the two houses not only denying this prerogative of the crown, the legality of which perhaps might be somewhat doubtful; but also seising into their own hands the entire power of the militia, the illegality of which step could never be any doubt at all.

k Rushworth. part 3. page 662. 667. See 8 Rym. 374, etc.
l Stat. 1 Edw. III. st. 2. c. 5 and 7. 25 Edw. III. st. 5. c. 8.
m 15 Rym. 78.
n Ibid. 103. Edit. 1654.

Soon after the restoration of king Charles the second, when the military tenures were abolished, it was thought proper to ascertain the power of the militia, to recognise the sole right of the crown to govern and command them, and to put the whole into a more regular method of military subordination[o]: and the order, in which the militia now stands by law, is principally built upon the statutes which were then enacted. It is true the two last of them are apparently repealed; but many of their provisions are re-enacted, with the addition of some new regulations, by the present militia laws, the general scheme of which is to discipline a certain number of the inhabitants of every county, chosen by lot for three years (4); and officered by the lord lieutenant, the deputy lieutenants, and other principal landholders, under a commission from the crown. They are not compellable to march out of their counties, unless in case of invasion or actual rebellion within the realm, (or any of its dominions or territories[p],) nor in any case compellable to march out of the kingdom (5). They are to be exercised at stated times: and their discipline in general is liberal and easy; but when drawn out into actual service, they are subject to the rigors of martial law, as necessary to keep them in order. This is the constitutional security, which our laws[q] have provided

o 13 Car. II. c. 6. 14 Car. II. c. 3. 15 Car. II. c. 4.

p Stat. 16 Geo. III. c. 3.

q 2 Geo. III. c. 20. 9 Geo. III. c. 42. 16 Geo. III. c. 3. 18 Geo. III. c. 14 and 59. 19 Geo. III. c. 72.

(4) And now for five years by the 26 Geo III. c. 107. s. 24. which has reduced into one act the former statutes relating to the militia.

(5) By 26 Geo. III. c. 107. s. 95. in all cases of actual invasion, or upon imminent danger thereof, and in all cases of rebellion or insurrection, it shall be lawful for his majesty, the occasion being first communicated to parliament, if sitting, if not sitting, declared in council, and notified by proclamation, to order the militia to be embodied, and to direct them to be led by their respective officers into any parts of this kingdom; but neither the whole, or any part, shall be ordered to go out of Great Britain. See the regulations respecting the militia, stated at large in *Burn*, tit. *Militia*.

for the public peace, and for protecting the realm against foreign or domestic violence.

When the nation was engaged in war, more veteran troops and more regular discipline were esteemed to be necessary, than could be expected from a mere militia. And therefore at such times more rigorous methods were put in use for the raising of armies and the due regulation and [413] discipline of the soldiery: which are to be looked upon only as temporary excrescences bred out of the distemper of the state, and not as any part of the permanent and perpetual laws of the kingdom. For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as sir Matthew Hale observes[q], in truth and reality no law, but something indulged rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land. Wherefore Thomas earl of Lancaster being condemned at Pontefract, 15 Edw. II, by martial law, his attainder was reversed 1 Edw. III, because it was done in time of peace[r]. And it is laid down[s], that if a lieutenant, or other, that hath commission of martial authority, doth in time of peace hang or otherwise execute any man by color of martial law, this is murder; for it is against *magna carta*[t]. The petition of right[u] moreover enacts, that no soldier shall be quartered on the subject without his own consent[v]: and that no commission shall issue to proceed within this land according to martial law. And whereas, after the restoration, king Charles the second kept up about five thousand regular troops, by his own authority, for guards and garrisons; which king James the second by degrees increased to no less than thirty thousand, all paid from his own civil list; it was made one of the

q Hist. C. L. c. 2.
r 2 Brad. Append. 39.
s 3 Inst. 52.
t *cap.* 29.
u 3 Car. I. See also Stat. 31. Car. II. c. 1.
v Thus, in Poland, no soldier can be quartered upon the gentry, the only freemen in that republic. Mod. Univ. Hist. xxxiv. 33.

articles of the bill of rights[v], that the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law.

BUT, as the fashion of keeping standing armies (which was first introduced by Charles VII. in France, *A. D.* 1445[w]) has of late years universally prevailed over Europe, (though some of its potentates, being unable themselves to maintain them, are obliged to have recourse to richer powers, and receive subsidiary pensions for that purpose,) it has also for many years past been annually judged necessary by our legislature, for the safety of the kingdom, the defence of the possessions of the crown of Great Britain, and the preservation of the balance of power in Europe, to maintain even in time of peace a standing body of troops, under the command of the crown; who are however *ipso facto* disbanded at the expiration of every year, unless continued by parliament. And it was enacted by statute 10 W. III. c. 1. that not more than twelve thousand regular forces should be kept on foot in Ireland, though paid at the charge of that kingdom; which permission is extended by statute 8 Geo. III. c. 13. to 16235 men in time of peace.

[414]

To prevent the executive power from being able to oppress, says baron Montesquieu[x], it is requisite that the armies with which it is intrusted should consist of the people, and have the same spirit with the people; as was the case at Rome, till Marius new-modelled the legions by inlisting the rabble of Italy, and laid the foundation of all the military tyranny that ensued. Nothing then, according to these principles, ought to be more guarded against in a free state, than making the military power, when such a one is necessary to be kept on foot, a body too distinct from the people. Like ours, it should wholly be composed of natural subjects; it ought only to be inlisted for a short and limited time; the soldiers also should live intermixed with the people; no separate camp, no barracks, no inland fortresses should be

v Stat. 1 W. and M. st. 2. c. 2. w Robertson, Cha. V. i. 94. x Sp. L. 11. 6.

allowed (6). And perhaps it might be still better, if, by dismissing a stated number and inlisting others at every renewal of their term, a circulation could be kept up between the army and the people, and the citizen and the soldier be more intimately connected together.

To keep this body of troops in order, an annual act of parliament likewise passes, "to punish mutiny and deser- "tion, and for the better payment of the army and [415] "their quarters." This regulates the manner in which they are to be dispersed among the several inn-keepers and victuallers throughout the kingdom; and establishes a law martial for their government. By this, among other things, it is enacted, that if any officer or soldier shall excite, or join any mutiny, or, knowing of it, shall not give notice to the commanding officer; or shall desert, or list in any other regiment, or sleep upon his post, or leave it before he is relieved, or hold correspondence with a rebel or enemy, or strike or use violence to his superior officer, or shall disobey his lawful commands: such offender shall suffer such punishment as a court martial shall inflict, though it extend to death itself.

HOWEVER expedient the most strict regulations may be in time of actual war, yet in times of profound peace, a little relaxation of military rigor would not, one should hope, be productive of much inconvenience. And, upon this principle, though by our standing laws [y] (still remaining in force, though not attended to) desertion in time of war is made felony, without benefit of clergy, and the offence is triable by

y Stat. 18 Hen. VI. c. 19. 2 and 3 Edw. VI. c. 2.

(6) Since this was written, with a genuine love of liberty, by the author, experience has proved, that the most formidable enemy which the people of England have to dread, is their own lawless mobs. Care ought therefore to be taken, that soldiers may never become familiar with the people in great towns, lest they should be more inclined to join, than to quell, a riot. *Nam neque quies gentium sine armis, neque arma sine stipendiis, neque stipendia sine tributis, haberi queunt.* Tac. Hist. iv. c. 74.

a jury and before justices at the common law: yet, by our militia-laws before mentioned, a much lighter punishment is inflicted for desertion in time of peace. So, by the Roman law also, desertion in time of war was punished with death, but more mildly in time of tranquillity [z]. But our mutiny act makes no such distinction: for any of the faults above-mentioned are, equally at all times, punishable with death itself, if a court martial shall think proper. This discretionary power of the court martial is indeed to be guided by the directions of the crown; which, with regard to military offences, has almost an absolute legislative power [a]. "His majesty, "says the act, may form articles of war, and constitute courts "martial, with power to try any crime by such articles, and "inflict penalties by sentence or judgment of the same." A vast and most important trust! an unlimited power to create crimes, and annex to them any punishments, not ex-
[416] tending to life or limb! These are indeed forbidden to be inflicted, except for crimes declared to be so punishable by this Act; which crimes we have just enumerated, and, among which, we may observe that any disobedience to lawful commands is one. Perhaps in some future revision of this act, which is in many respects hastily penned, it may be thought worthy the wisdom of parliament to ascertain the limits of military subjection, and to enact express articles of war for the government of the army, as is done for the government of the navy; especially as, by our present constitution, the nobility and gentry of the kingdom, who serve their country as militia officers, are annually subjected to the same arbitrary rule, during their time of exercise.

One of the greatest advantages of our English law is, that not only the crimes themselves which it punishes, but also the penalties which it inflicts, are ascertained and notorious: nothing is left to arbitrary discretion; the king by his judges dispenses what the law has previously ordained; but is not

z Ff. 49. 16. 5.

a A like power over the marines is given to the lords of the admiralty, by another annual act "for the regulation of his majes-"ty's marine forces while on shore."

himself the legislator. How much therefore is it to be regretted that a set of men, whose bravery has so often preserved the liberties of their country, should be reduced to a state of servitude in the midst of a nation of freemen! for sir Edward Coke will inform us[a], that it is one of the genuine marks of servitude, to have the law, which is our rule of action, either concealed or precarious: "*misera est servitus ubi jus est "vagum aut incognitum.*" Nor is this state of servitude quite consistent with the maxims of sound policy observed by other free nations. For, the greater the general liberty is which any state enjoys, the more cautious has it usually been in introducing slavery in any particular order or profession. These men, as baron Montesquieu observes[b], seeing the liberty which others possess, and which they themselves are excluded from, are apt (like eunuchs in the eastern seraglios) to live in a state of perpetual envy and hatred towards the rest of the community; and indulge a malignant pleasure in contributing to destroy those privileges, to which they can never be admitted. Hence have many free states, by departing from this rule, been endangered by the revolt of their slaves: while, in absolute and despotic governments [417] where no real liberty exists, and consequently no invidious comparisons can be formed, such incidents are extremely rare. Two precautions are therefore advised to be observed in all prudent and free governments: 1. To prevent the introduction of slavery at all: or, 2. If it be already introduced, not to intrust those slaves with arms; who will then find themselves an overmatch for the freemen. Much less ought the soldiery to be an exception to the people in general, and the only state of servitude in the nation.

But as soldiers, by this annual act, are thus put in a worse condition than any other subjects, so by the humanity of our standing laws, they are in some cases put in a much better. By statute 43 Eliz. c. 3. a weekly allowance is to be raised in every county for the relief of soldiers that are sick, hurt,

[a] 4 Inst. 332. [b] Sp. L. 15. 12.

and maimed: not forgetting the royal hospital at Chelsea, for such as are worn out in their duty. Officers and soldiers, that have been in the king's service, are by several statutes, enacted at the close of several wars, at liberty to use any trade or occupation they are fit for, in any town in the kingdom, (except the two universities,) notwithstanding any statute, custom, or charter to the contrary (7). And soldiers in actual military service may make nuncupative wills, and dispose of their goods, wages, and other personal chattels, without those forms, solemnities, and expenses, which the law requires in other cases[c]. Our law does not indeed extend this privilege so far as the civil law; which carried it to an extreme that borders upon the ridiculous. For if a soldier, in the article of death, wrote any thing in bloody letters on his shield, or in the dust of the field with his sword, it was a very good military testament[d]. And thus much for the military state, as acknowledged by the laws of England (8).

c Stat. 29 Car. II. c. 3. 5 W. III. c. 21. sec. 6.

d Si milites quid in clypeo literis sanguine suo rutilantibus adnotaverint, aut in pulvere inscripserint gladio suo, ipso tempore quo, in proelio, vitiae sortem derelinquunt, hujusmodi voluntatem stabilem esse oportet. Cod. 6. 21. 15.

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(7) By the 42 Geo. III. c. 69. all officers, soldiers, and mariners, who have been employed in the king's service since 1784, and have not deserted, and their wives and children, may exercise any trade in any town in the kingdom, and shall not be removed till they are actually chargeable. The same privilege is extended to all officers and soldiers, who have served in the militia or the fencible regiments, and have been honorably discharged.

But any two justices of the county or place may examine any such person with regard to his legal settlement, who shall make oath thereof; and the justices shall give such person an attested copy of his affidavit, which shall afterwards be admitted as evidence of such settlement.

(8) It is now fully established, that both the full pay and half pay of an officer, or any person in a military or naval character, cannot in any instance be assigned before it is due; as the object of such pay is to enable those who receive it always to be ready to serve their country with that decency and dignity which their respective characters and stations require. 4 *T. R.* 258. *H. Bl.* 628.

THE *maritime* state is nearly related to the former: though much more agreeable to the principles of our free constitution. The royal navy of England hath ever been its [418] greatest defence and ornament; it is its ancient and natural strength; the floating bulwark of the island; an army, from which, however strong and powerful, no danger can ever be apprehended to liberty: and accordingly it has been assiduously cultivated, even from the earliest ages. To so much perfection was our naval reputation arrived in the twelfth century, that the code of maritime laws, which are called the laws of Oleron, and are received by all nations in Europe as the ground and substruction of all their marine constitutions, was confessedly compiled by our king Richard the first, at the isle of Oleron on the coast of France, then part of the possessions of the crown of England[e]. And yet, so vastly inferior were our ancestors in this point to the present age, that even in the maritime reign of queen Elizabeth, sir Edward Coke[f] thinks it matter of boast, that the royal navy of England then consisted of *three and thirty* ships. The present condition of our marine is in great measure owing to the salutary provisions of the statutes, called the navigation acts; whereby the constant increase of English shipping and seamen was not only encouraged but rendered unavoidably necessary. By the statute 5 Ric. II. c. 3. in order to augment the navy of England, then greatly diminished, it was ordained, that none of the king's liege people should ship any merchandise out of or into the realm but only in ships of the king's ligeance, on pain of forfeiture. In the next year, by statute 6 Ric. II. c. 8. this wise provision was enervated, by only obliging the merchants to give English ships (if able and sufficient) the preference. But the most beneficial statute for the trade and commerce of these kingdoms is that navigation-act, the rudiments of which were first framed in 1650[g], with a narrow partial view: being intended to mortify our own sugar islands, which were disaffected to the parliament and still held out for Charles II, by

[e] 4 Inst. 144. *Coutumes de la mer.* 2. [f] 4 Inst. 50. [g] Scobell. 132.

stopping the gainful trade which they then carried on with the Dutch[h]; and at the same time to clip the wings of those our opulent and aspiring neighbours. This prohibited all ships of foreign nations from trading with any English plan-
[419] tations without license from the council of state. In 1651[i] the prohibition was extended also to the mother country: and no goods were suffered to be imported into England, or any of its dependencies, in any other than English bottoms; or in the ships of that European nation, of which the merchandise imported was the genuine growth or manufacture (9). At the restoration, the former provisions were continued, by statute 12 Car. II. c. 18. with this very material improvement, that the master and three-fourths of the mariners shall also be English subjects (10).

MANY laws have been made for the supply of the royal navy with seamen; for their regulation when on board; and to confer privileges and rewards on them during and after their service.

1. FIRST, for their supply. The power of impressing seafaring men for the sea service by the king's commission, has

h Mod. Un. Hist. xli. 289. i Scobell. 176.

(9) By the 26 Geo. III. c. 60. No privileges are to be allowed to any ships which are not British-built, or built in some part of his majesty's dominions: and every such ship must be registered in the port to which she belongs, according to the directions of that statute, the 27 Geo. III. c. 19. and the 34 Geo. III. c. 68.

(10) The 34 Geo. III. c. 68. enacts that after the expiration of six months from the conclusion of the existing war, no goods or merchandise shall be imported into, or exported from, the kingdom of Great Britain, or the islands of Guernsey, Jersey, Alderney, Sark, or Man, on board any ship, which is not navigated by a master and three-fourths, at least, of the mariners British subjects.

And ships or vessels sailing from one place to another within the kingdom, or in the aforesaid islands, must be manned wholly with British subjects.

The wilful violation of these regulations subjects the owners to a forfeiture of the ship and all the goods on board.

By the 42 Geo. 3. c. 61. Ireland and Irish sailors are included in these regulations, which they were not subject to before.

been a matter of some dispute, and submitted to with great reluctance; though it hath very clearly and learnedly been shewn, by sir Michael Foster[j], that the practice of impressing, and granting powers to the admiralty for that purpose, is of very ancient date, and hath been uniformly continued by a regular series of precedents to the present time: whence he concludes it to be part of the common law[k]. The difficulty arises from hence, that no statute has expressly declared this power to be in the crown, though many of them very strongly imply it. The statute 2 Ric. II. c. 4. speaks of mariners being arrested and retained for the king's service, as of a thing well known and practised without dispute; and provides a remedy against their running away. By a later statute[l], if any waterman, who uses the river Thames, shall hide himself during the execution of any commission of pressing for the king's service, he is liable to heavy penalties. By another[m], no fisherman shall be taken by the queen's commission to serve as a mariner; but the commission shall be first brought to two justices of the peace, inhabiting near the sea coast where the mariners are to be taken, to the intent that [420] the justices may choose out and return such a number of able-bodied men, as in the commission are contained, to serve her majesty. And, by others[n], especial protections are allowed to seamen in particular circumstances, to prevent them from being impressed. And ferrymen are also said to be privileged from being impressed, at common law[o]. All which do most evidently imply a power of impressing to reside somewhere; and, if any where, it must from the spirit of our constitution, as well as from the frequent mention of the king's commission, reside in the crown alone (11).

j Rep. 154.
k See also Comb. 245. Barr. 334.
l Stat. 2 and 3 Ph. and M. c. 16.
m Stat. 5 Eliz. c. 5.
n See Stat. 7 and 8 W. III. c. 21. 2 Ann. c. 6. 4 and 5 Ann. c. 19. 13 Geo. II. c. 17. 2 Geo. III. c. 15. 11 Geo. III. c. 38. 19 Geo. III. c. 75, etc.
o Sav. 14.

(11) The legality of pressing is so fully established, that it will not now admit of a doubt in any court of justice. In the case of the King

But, besides this method of impressing, (which is only defensible from public necessity, to which all private considerations must give way,) there are other ways that tend to the increase of seamen, and manning the royal navy. Parishes may bind out poor boys apprentices to masters of merchantmen, who shall be protected from impressing for the first three years; and if they are impressed afterwards, the masters shall be allowed their wages[p]: great advantages in point of wages are given to volunteer seamen in order to induce them to enter into his majesty's service[q]: and every foreign seaman, who during a war shall serve two years in any man of war, merchantman, or privateer, is naturalized *ipso facto*[r]. About the middle of king William's reign a scheme was set on foot[s] for a register of seamen to the number of thirty thousand, for a constant and regular supply of the king's fleet; with great privileges to the registered men, and, on the other hand, heavy penalties in case of their non-appear-

p Stat. 2 Ann. c. 6.
q Stat. 31 Geo. II. c. 10.
r Stat. 13 Geo. II. c. 3.
s Stat. 7 and 8 W. III. c. 21.

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v. Jubbs, lord Mansfield says, "the power of pressing is founded upon "immemorial usage, allowed for ages. If it be so founded and allowed "for ages, it can have no ground to stand upon, nor can it be vindicated "or justified by any reason, but the safety of the state. And the prac-"tice is deduced from that trite maxim of the constitutional law of "England 'that private mischief had better be submitted to, than pub-"lic detriment and inconvenience should ensue.' And though it be a "legal power, it may, like many others, be abused in the exercise of "it." *Cowp.* 517. In that case, the defendant was brought up by *habeas corpus* upon the ground that he was entitled to an exemption; but the court held that the exemption was not made out, and he was remanded to the ship from which he had been brought.

Lord Kenyon has also declared in a similar case, that the right of pressing is founded on the common law, and extends to all persons exercising employments in the seafaring line. Any exemptions, therefore, which such persons may claim, must depend upon the positive provisions of statutes. 5 *T. R.* 276.

ance when called for: but this registry, being judged to be ineffectual as well as oppressive, was abolished by statute 9 Ann. c. 21.

2. The method of ordering seamen in the royal fleet, and keeping up a regular discipline there, is directed by certain express rules, articles, and orders, first enacted by the authority of parliament soon after the restoration[t]; but since new-modelled and altered, after the peace of [421] Aix la Chapelle[u], to remedy some defects which were of fatal consequence in conducting the preceding war. In these articles of the navy almost every possible offence is set down, and the punishment thereof annexed: in which respect the seamen have much the advantage over their brethren in the land-service; whose articles of war are not enacted by parliament, but framed from time to time at the pleasure of the crown. Yet from whence this distinction arose, and why the executive power, which is limited so properly with regard to the navy, should be so extensive with regard to the army, it is hard to assign a reason: unless it proceeded from the perpetual establishment of the navy, which rendered a permanent law for their regulation expedient; and the temporary duration of the army, which subsisted only from year to year, and might therefore with less danger be subjected to discretionary government. But whatever was apprehended at the first formation of the mutiny act, the regular renewal of our standing force at the entrance of every year has made this distinction idle. For, if from experience past we may judge of future events, the army is now lastingly ingrafted into the British constitution; with this singularly fortunate circumstance, that any branch of the legislature may annually put an end to its legal existence, by refusing to concur in its continuance.

3. With regard to the privileges conferred on sailors, they are pretty much the same with those conferred on sol-

t Stat. 13 Car. II. st. 1. c. 9.
u Stat. 22 Geo. II. c. 33. amended by 19 Geo. III. c. 17.

diers; with regard to relief when maimed, or wounded, or superannuated, either by county rates, or the royal hospital at Greenwich; with regard also to the exercise of trades, and the power of making nuncupative testaments: and farther[w], no seaman aboard his majesty's ships can be arrested for any debt, unless the same be sworn to amount to at least twenty pounds; though by the annual mutiny acts, a soldier may be arrested for a debt which extends to half that value, but not to a less amount (12).

[w] Stat. 31 Geo. II. c. 10.

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(12) But by the late mutiny acts, a soldier, like a seaman, cannot be arrested or taken in execution for any debt less than 20*l*. The statutes except any criminal matter, and thereupon it has been decided, that a soldier may be committed for refusing to indemnify the parish against a bastard child; or for disobeying an order of justices to pay a weekly allowance for it. *5 T. R.* 156. *2 T. R.* 270.

Here it may not be improper to add, that since the time of queen Anne, a variety of statutes have been passed to encourage attempts to discover the longitude at sea; and by the 14 Geo. III. c. 66. which has repealed the former statutes, it is enacted, that the author of any useful and practicable plan to discover the longitude at sea, either by time-keepers or astronomical calculations, shall be entitled to a reward of 5000*l*. if the longitude can be determined at sea within a degree of a great circle, or sixty geographical miles; to 7,500*l*. if within $\frac{3}{4}$ of a degree; and to 10,000*l*. if within $\frac{1}{2}$ a degree. And if any useful discovery shall be made respecting the longitude, though not entitled to those great rewards, or if any beneficial improvement shall be introduced into navigation, the commissioners of the longitude may award such less sum as they may think the ingenuity or industry of the author deserves.

And by 16 Geo. III. c. 6. if any ship discovers a passage between the Atlantic and Pacific oceans, beyond the 52d degree North latitude, the owner or commander, if a king's ship, shall receive 20,000*l*.; and 5000*l*. shall be given in like manner to the first ship that shall approach within one degree of the North pole.

CHAPTER THE FOURTEENTH.

OF MASTER AND SERVANT.

HAVING thus commented on the rights and duties of persons, as standing in the *public* relations of magistrates and people, the method I have marked out now leads me to consider their rights and duties in *private* œconomical relations.

THE three great relations in private life are, 1. That of *master and servant*; which is founded in convenience, whereby a man is directed to call in the assistance of others, where his own skill and labor will not be sufficient to answer the cares incumbent upon him. 2. That of *husband and wife*; which is founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated. 3. That of *parent and child*, which is consequential to that of marriage, being its principal end and design: and it is by virtue of this relation that infants are protected, maintained, and educated. But, since the parents, on whom this care is primarily incumbent, may be snatched away by death before they have completed their duty, the law has therefore provided a fourth relation; 4. That of *guardian and ward*, which is a kind of artificial parentage, in order to supply the deficiency, whenever it happens, of the natural. Of all these relations in their order.

In discussing the relation of *master* and *servant*, I shall, first, consider the several sorts of servants, and how this relation is created and destroyed: secondly, the effect of this relation with regard to the parties themselves: and, lastly, its effect with regard to other persons.

I. As to the several sorts of servants: I have formerly observed [a] that pure and proper slavery does not, nay cannot, subsist in England: such I mean, whereby an absolute and unlimited power is given to the master over the life and fortune of the slave. And indeed it is repugnant to reason, and the principles of natural law, that such a state should subsist any where. The three origins of the right of slavery, assigned by Justinian [b], are all of them built upon false foundations [c]. As, first, slavery is held to arise "*jure gentium*," from a state of captivity in war; whence slaves are called *mancipia*, *quasi manu capti*. The conqueror, say the civilians, had a right to the life of his captive; and, having spared that, has a right to deal with him as he pleases. But it is an untrue position, when taken generally, that by the law of nature or nations, a man may kill his enemy: he has only a right to kill him, in particular cases; in cases of absolute necessity, for self-defence; and it is plain this absolute necessity did not subsist, since the victor did not actually kill him, but made him prisoner. War is itself justifiable only on principles of self-preservation; and therefore it gives no other right over prisoners but merely to disable them from doing harm to us, by confining their persons: much less can it give a right to kill, torture, abuse, plunder, or even to enslave, an enemy, when the war is over. Since therefore the right of *making* slaves by captivity depends on a supposed right of slaughter, that foundation failing, the consequence drawn from it must fail likewise. But, secondly, it is said that slavery may begin "*jure civili*;" when one man sells himself to another. This, if only meant of contracts to serve or work for another, is very

a Pag. 127.

b Servi aut fiunt, aut nascuntur: fiunt jure gentium, aut jure civili: nascuntur ex ancillis nostris. *Inst.* 1. 3. 4.

c Montesq. Sp. L. xv. 2.

just: but when applied to strict slavery, in the sense of the laws of old Rome or modern Barbary, is also impossible. Every sale implies a price, a *quid pro quo*, an equivalent given to the seller in lieu of what he transfers to the buyer: but what equivalent can be given for life, and liberty, both of which (in absolute slavery) are held to be in the master's disposal? His property also, the very price he seems to receive, devolves *ipso facto* to his master, the instant he becomes his slave. In this case therefore the buyer gives nothing, and the seller receives nothing: of what validity then can a sale be, which destroys the very principles upon which all sales are founded? Lastly, we are told, that besides these two ways by which slaves "*fiunt*," or are acquired, they may also be hereditary: "*servi nascuntur*;" the children of acquired slaves are *jure naturae*, by a negative kind of birthright, slaves also. But this, being built on the two former rights, must fall together with them. If neither captivity, nor the sale of one's self, can by the law of nature and reason reduce the parent to slavery, much less can they reduce the offspring.

Upon these principles the law of England abhors, and will not endure the existence of, slavery within this nation: so that when an attempt was made to introduce it, by statute 1 Edw. VI. c. 3. which ordained, that all idle vagabonds should be made slaves, and fed upon bread and water, or small drink, and refuse meat; should wear a ring of iron round their necks, arms, or legs; and should be compelled by beating, chaining, or otherwise, to perform the work assigned them, were it never so vile; the spirit of the nation could not brook this condition, even in the most abandoned rogues; and therefore this statute was repealed in two years afterwards[d]. And now it is laid down[e], that a slave or negro, the instant he lands in England, becomes a freeman; that is, the law will protect him in the enjoyment of his person, and his property. Yet, with regard to any right which the master may have lawfully acquired to the perpetual service of

[d] Stat. 3 and 4 Edw. VI. c. 16. [e] Salk. 666.

John or Thomas, this will remain exactly in the same state as before: for this is no more than the same state of subjection for life, which every apprentice submits to for the space of seven years, or sometimes for a longer term (1). Hence too it follows, that the infamous and unchristian practice of withholding baptism from negro servants, lest they should thereby gain their liberty, is totally without foundation, as well as without excuse. The law of England acts upon general and extensive principles: it gives liberty, rightly understood, that is, protection to a jew, a turk, or a heathen, as well as to those who profess the true religion of Christ; and it will not dissolve a civil obligation between master and servant, on account of the alteration of faith in either of the parties: but the slave is entitled to the same protection in England before, as after, baptism: and, whatever service the heathen negro owed of right to his American master, by general not by local law, the same (whatever it be) is he bound to render when brought to England and made a christian (2).

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(1) The meaning of this sentence is not very intelligible. If a right to perpetual service can be acquired lawfully at all, it must be acquired by a contract with one who is free, who is *sui juris*, and competent to contract. Such a hiring may not perhaps be illegal and void. If a man can contract to serve for one year, there seems to be no reason to prevent his contracting to serve for 100 years, if he should so long live: though, in general, the courts would be inclined to consider it an improvident engagement, and would not be very strict in enforcing it. But there could be no doubt, but such a contract with a person in a state of slavery would be absolutely null and void.

(2) We might have been surprised, that the learned Commentator should condescend to treat this ridiculous notion and practice with so much seriousness, if we were not apprized, that the court of common pleas, so late as the 5 W. & M. held, that a man might have a property in a negro boy, and might bring an action of trover for him, *because negroes are heathens*. 1 *Ld. Ray.* 147. A strange principle to found a right of property upon!

But it was decided in 1772, in the celebrated case of James Somersett, that a heathen negro, when brought to England, owes no service to an American or any other master. James Somersett had been made

1. The first sort of servants therefore, acknowledged by the laws of England, are *menial servants*; so called from being *intra moenia*, or domestics. The contract between them and their masters arises upon the hiring. If the hiring be general without any particular time limited, the law construes it to be a hiring for a year[f]; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons; as well when there is work to be done, as when there is not[g]: but the contract may be made for any larger or smaller term. All single men between twelve years old and sixty, and married ones under thirty years of age, and all single women between

f Co. Litt. 42. g F. N. B. 168.

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a slave in Africa, and was sold there; from thence he was carried to Virginia, where he was bought, and brought by his master to England; here he ran away from his master, who seised him, and carried him on board a ship, where he was confined, in order to be sent to Jamaica to be sold as a slave. Whilst he was thus confined, Lord Mansfield granted a *habeas corpus*, ordering the captain of the ship to bring up the body of James Somersett, with the cause of his detainer. The above-mentioned circumstances being stated upon the return to the writ, after much learned discussion in the court of king's bench, the court were unanimously of opinion, that the return was insufficient, and that Somersett ought to be discharged. See Mr. Hargrave's learned argument for the negro in 11 *St. Tr.* 340; and the case reported in *Lofft's Reports*, 1. In consequence of this decision, if a ship loaden with slaves was obliged to put into an English harbor, all the slaves on board might and ought to be set at liberty. Though there are acts of parliament which recognise and regulate the slavery of negroes, yet it exists not in the contemplation of the common law; and the reason that they are not declared free before they reach an English harbor, is only because their complaints cannot sooner be heard and redressed by the process of an English court of justice.

Liberty by the English law depends not upon the complexion; and what was said even in the time of queen Elizabeth, is now substantially true, that the air of England is too pure for a slave to breathe in. 2 *Rushw.* 468.

twelve and forty, not having any visible livelihood, are compellable by two justices to go out to service in husbandry or certain specific trades, for the promotion of honest industry: and no master can put away his servant, or servant leave his master, after being so retained, either before or at the end of his term, without a quarter's warning; unless upon reasonable cause to be allowed by a justice of the peace[h] (3): but they may part by consent, or make a special bargain.

2. ANOTHER species of servants are called *apprentices*, (from *apprendre*, to learn,) and are usually bound for a term of years, by deed indented or indentures, to serve their masters, and be maintained and instructed by them. This is usually done to persons of trade, in order to learn their art and mystery; and sometimes very large sums are given with them, as a premium for such their instruction: but it may be done to husbandmen, nay to gentlemen, and others. And[i] children of poor persons may be apprenticed out by the overseers, with consent of two justices, till twenty-one years of age, to such persons as are thought fitting; who are also compellable to take them; and it is held, that gentlemen of fortune, and clergymen, are equally liable with others to such compulsion[k] (4): for which purposes our statutes have made the

h Stat. 5 Eliz. c. 4.
i Stat. 5 Eliz. c. 4. 43 Eliz. c. 2. 1 Jac. I. c. 25. 7 Jac. I. c. 3. 8 and 9 W. and M. c. 30. 2 and 3 Ann. c. 6. 4 Ann. c. 19. 17 G. II. c. 5. 18 G. III. c. 47.
k Salk. 67. 491.

(3) But this relates only to servants employed in husbandry. It has been the practice for magistrates to exercise a jurisdiction over domestic servants, and it would be very useful to the public, that they should possess such a jurisdiction; but it has lately been decided, that their authority, under the 5 Eliz. c. 4. is confined to servants employed in husbandry. 6 *T. R.* 583. But it has been held that a master may turn away a servant for incontinence, or moral turpitude, for such misconduct produces a dissolution of the contract. *Cald.* 14.

(4) The parish officers, with the assent of two justices, may bind a parish-apprentice to a person who resides out of their parish, if he occupies an estate in the parish. 3 *T. R.* 107. Or to partners, who reside

indentures obligatory, even though such parish-apprentice be a minor[l]. Apprentices to trades may be discharged on reasonable cause, either at the request of themselves or masters, at the quarter-sessions, or by one justice, with appeal to the sessions[m]; who may, by the equity of the statute, if they think it reasonable, direct restitution of a ratable share of the money given with the apprentice[n]: and parish-apprentices may be discharged in the same manner, by two justices[o] (5).

l Stat. 5 Eliz. c. 4. 43 Eliz. c. 2. Cro. Car. 179.
m Stat. 5 Eliz. c. 4.
n Salk. 67.
o Stat. 20 Geo. II. c. 19.

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out of the parish, though some of the partners are resident upon the partnership property within the parish. 7 *T. R.* 33.

(5) By 32 Geo. III. c. 57. where a parish-apprentice is discharged from a master on account of the misconduct of the master, the justices may order the master to deliver up his clothes, and to pay a sum not exceeding 10*l.* to place him with another master. See the other provisions of this statute, and the subject stated at large, in *Burn*, tit. *Apprentice*.

And by the 33 Geo. III. c. 55. wherever a master or mistress has not received more than ten pounds with an apprentice, two or more justices at a special or petty sessions may, upon complaint and proof of ill-usage of the apprentice, fine the master or mistress any sum not exceeding forty shillings; and the fine may, at the discretion of the justices, be applied to the use of the apprentice, as a compensation for the injury which he may have sustained.

By the 42 Geo. III. c. 46. the overseers of the poor shall keep a register, containing a full description of every child, bound out by them as a parish-apprentice, according to a form prescribed by the statute, which register shall be signed by the magistrates who assent to the indentures. Upon omission, the overseers shall forfeit five pounds. The magistrates of the county may inspect the register *gratis*; and other persons, paying 6*d.* If the indentures are proved to be lost or destroyed, then the register shall be evidence of the binding.

The 42 Geo. III. c. 73. contains many salutary and excellent regulations for the preservation of the health and morals of apprentices and others employed in cotton and other factories.

But if an apprentice, with whom less than ten pounds hath been given, runs away from his master, he is compellable to serve out his time of absence, or make satisfaction for the same, at any time within seven years after the expiration of his original contract[p].

3. A THIRD species of servants are *laborers*, who are only hired by the day or the week, and do not live *intra* [427] *moenia*, as part of the family; concerning whom the statutes before cited[q] have made many very good regulations: 1. Directing that all persons who have no visible effects may be compelled to work: 2. Defining how long they must continue at work in summer and in winter: 3. Punishing such as leave or desert their work: 4. Empowering the justices at sessions, or the sheriff of the county, to settle their wages: and 5. Inflicting penalties on such as either give, or exact, more wages than are so settled.

4. THERE is yet a fourth species of servants, if they may be so called, being rather in a superior, a ministerial, capacity; such as *stewards*, *factors*, and *bailiffs*: whom however the law considers as servants *pro tempore*, with regard to such of their acts as affect their master's or employer's property. Which leads me to consider,

II. THE manner in which this relation, of service, affects either the master or servant. And, first, by hiring and service for a year, or apprenticeship under indentures, a person gains a settlement in that parish wherein he last served forty days[r]. In the next place, persons, serving seven years as apprentices to any trade, have an exclusive right to exercise that trade in any part of England[s]. This law, with regard to the exclusive part of it, has by turns been looked upon as a hard law, or as a beneficial one, according to the prevailing humor of the times: which has occasioned a great variety

p Stat. 6 Geo. III. c. 26.
q Stat. 5 Eliz. c. 4. 6 Geo. III. c. 26.
r See page 364.
s Stat. 5 Eliz. c. 4. sec. 31.

of resolutions in the courts of law concerning it; and attempts have been frequently made for its repeal, though hitherto without success. At common law every man might use what trade he pleased; but this statute restrains that liberty to such as have served as apprentices: the adversaries to which provision say, that all restrictions (which tend to introduce monopolies) are pernicious to trade; the advocates for it allege, that unskilfulness in trades is equally detrimental to the public, as monopolies. This reason indeed only extends to such trades, in the exercise whereof skill [428] is required: but another of their arguments goes much farther; *viz.* that apprenticeships are useful to the commonwealth, by employing of youth, and learning them to be early industrious (6); but that no one would be induced to undergo a seven years servitude, if others, though equally skilful, were allowed the same advantages without having undergone the same discipline: and in this there seems to be much reason. However, the resolutions of the courts have in general rather confined than extended the restriction. No trades are held to be within the statute, but such as were in being at the making of it[t]: for trading in a country village, apprenticeships are not requisite[u]: and following the trade seven years, without any effectual prosecution, (either as a master or a servant,) is sufficient without an actual apprenticeship[w] (7).

t Lord Raym. 514.
u 1 Ventr. 51. 2 Keb. 583.
w Lord Raym. 1179. Wallen *qui tam* v. Holton. Tr. 33 Geo. II. (by all the judges.)

(6) Lord Coke says, this statute was not enacted only that workmen should be skilful, but also that youth should not be nourished in idleness, but brought up and educated in lawful sciences and trades. 11 *Co.* 54.

(7) The penalty is 40*s.* a month, one half to the king, the other half to the prosecutor. The words of the statute are, *having served as an apprentice*, and there can be no doubt but the legislature intended that

A MASTER may by law correct his apprentice for negligence or other misbehaviour, so it be done with moderation[x]: though, if the master or master's wife beats any other servant of full age, it is good cause of departure[y] (8). But if any servant, workman, or laborer assaults his master or dame, he shall suffer one year's imprisonment, and other open corporal punishment, not extending to life or limb[z].

BY service all servants and laborers, except apprentices, become entitled to wages: according to their agreement, if menial servants; or according to the appointment of the sheriff or sessions, if laborers or servants in husbandry: for the statutes for regulation of wages extend to such servants only[a]; it being impossible for any magistrate to be a judge of the employment of menial servants, or of course to assess their wages.

III. LET us, lastly, see how strangers may be affected by this relation of master and servant: or how a master [429] may behave towards others on behalf of his servant; and what a servant may do on behalf of his master.

AND, first, the master may *maintain*, that is, abet and assist his servant in any action at law against a stranger: whereas, in general, it is an offence against public justice to encourage suits and animosities, by helping to bear the expense of them, and is called in law maintenance[b]. A

x 1 Hawk. P. C. 130. Lamb. Eiren. 127. Cro. Car. 179. 2 Show. 289.
y F. N. B. 168. Bro. Abr. t. Laborers 51. Trespass 349.
z Stat. 5 Eliz. c. 4.
a 2 Jones, 47.
b 2 Roll. Abr. 115.

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the tradesman should have served an actual apprenticeship; but from the words, *as an apprentice*, this being a penal statute, the judges have determined that he serves as an apprentice, who for seven years has been working as a master. 2 *Wils.* 168.; or as the master's wife. 1 *Barnard.* 367.

(8) Or rather of complaint to a magistrate to be discharged.

master also may bring an action against any man for beating or maiming his servant: but in such case he must assign, as a special reason for so doing, his own damage by the loss of his service (9); and this loss must be proved upon the trial[c]. A master likewise may justify an assault in defence of his servant, and a servant in defence of his master[d]: the master, because he has an interest in his servant, not to be deprived of his service; the servant, because it is part of his duty, for which he receives his wages, to stand by and defend his master[e]. Also if any person do hire or retain my servant, being in my service, for which the servant departeth from me and goeth to serve the other, I may have an action for damages against both the new master and the servant, or either of them: but if the new master did not know that he is my servant, no action lies; unless he afterwards refuse to restore him upon information and demand[f]. The reason and foundation upon which all this doctrine is built, seem to be the property that every man has in the service of his domestics; acquired by the contract of hiring, and purchased by giving them wages.

As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given, or implied: *nam qui facit per alium, facit per se*[g]. Therefore, if the servant commit a

c 9 Rep. 113.

d 2 Roll. Abr. 546.

e In like manner, by the laws of king Alfred, c. 38. a servant was allowed to fight for his master, a parent for his child, and a husband or father for the chastity of his wife or daughter.

f F. N. B. 167, 168.

g 4 Inst. 109.

(9) This is an action upon the case, generally, called a *per quod servitium amisit*. This action by a master for beating his servant, has been contrived by a species of fiction, to be extended to a parent, to enable him to recover a pecuniary compensation, under some circumstances, for the seduction of his daughter. See 3 vol. p. 143. note.

trespass by the command or encouragement of his master, the master shall be guilty of it, though the servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful. If an inn-keeper's servants rob his guests, the master is bound to restitution [h]: for as there is a confidence reposed in him, that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery (10) *nam, qui non prohibet, cum prohibere possit, jubet.* So likewise if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master [i]: for although the master did not expressly order the servant to sell it to that person in particular, yet his permitting him to draw and sell it at all is impliedly a general command.

In the same manner, whatever a servant is permitted to do in the usual course of his business, is equivalent to a general command. If I pay money to a banker's servant, the banker is answerable for it: if I pay it to a clergyman's or a physician's servant, whose usual business it is not to receive money for his master, and he embezzles it, I must pay it over again. If a steward lets a lease of a farm, without the owner's knowledge, the owner must stand to the bargain; for this is the steward's business. A wife, a friend, a relation, that use to transact business for a man, are *quoad hoc* his servants: and the principal must answer for their conduct: for the law implies,

[h] Noy's max. c. 43. [i] 1 Roll. Abr. 95.

(10) But it has been long established law, that the innkeeper is bound to restitution if the guest is robbed in his house by any person whatever; unless it should appear that he was robbed by his own servant, or by a companion whom he brought with him. 8 *Co.* 33. And where an innkeeper had refused to take the charge of goods, because his house was full; yet he was held liable for the loss, the owner having stopt as a guest, and the goods being stolen during his stay. 5 *T. R.* 273.

that they act under a general command; and without such a doctrine as this no mutual intercourse between man and man could subsist with any tolerable convenience. If I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes up upon trust; for here is no implied order to the tradesman to trust my servant: but if I usually send him upon trust, or sometimes on trust and sometimes with ready money, I am answerable for all he takes up; for the tradesman cannot possibly distinguish when he comes by my order, and when upon his own authority [k] (11).

If a servant, lastly, by his negligence does any [431] damage to a stranger, the master shall answer for his neglect: if a smith's servant lames a horse while he is shoeing him, an action lies against the master, and not against the servant. But in these cases the damage must be done, while he is actually employed in the master's service; otherwise the servant shall answer for his own misbehaviour. Upon this principle, by the common law [l], if a servant kept his masters fire negligently, so that his neighbour's house was burned down thereby, an action lay against the master; because this negligence happened in his service: otherwise, if the servant, going along the street with a torch, by negligence sets fire to a house; for there he is not in his master's immediate service; and must himself answer the damage personally. But now the common law is, in the former case, altered by statute 6 Anne, c. 3. which ordains that no action shall be maintained against any, in whose house or chamber any fire shall accidentally begin; for their own loss is suffi-

k Dr. and Stud. d. 2, c. 42. Noy's max. c. 44. l Noy's max. c. 44.

(11) And if I once pay for what my servant has bought upon trust, without expressing any disapprobation of it, it is equivalent to a direction to trust him in future; and I shall be answerable for all he takes up upon credit, till an express order is given to the tradesman not to give him further credit.

cient punishment for their own or their servant's carelessness. But if such fire happens through negligence of any servant, (whose loss is commonly very little,) such servant shall forfeit 100*l.* to be distributed among the sufferers; and, in default of payment, shall be committed to some workhouse and there kept to hard labor for eighteen months [m]. A master is, lastly, chargeable if any of his family layeth or casteth any thing out of his house into the street or common highway, to the damage of any individual, or the common nuisance of his majesty's liege people [n]: for the master hath the superintendance and charge of all his household. And this also agrees with the civil law [o]; which holds that the *pater familias*, in this and similar cases, "*ob alterius culpam tenetur, sive servi, sive liberi.*"

[432] We may observe, that in all the cases here put, the master may be frequently a loser by the trust reposed in his servant, but never can be a gainer; he may frequently be answerable for his servant's misbehaviour, but never can shelter himself from punishment by laying the blame on his agent. The reason of this is still uniform and the same; that the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim, that no man shall be allowed to make any advantage of his own wrong (12).

m Upon a similar principle, by the law of the twelve tables at Rome, a person by whose negligence any fire began, was bound to pay double to the sufferers; or, if he was not able to pay, was to suffer a corporal punishment.

n Noy's max. c. 44.

o Ff. 9. 3. 1. Inst. 4. 5. 1.

(12) In a late case where it was proved that a servant wilfully drove his master's chariot against a chaise, but that the master was not present, nor did he in any manner direct, or assent to, the act of the servant, it was held by the court of king's bench, that the owner of the chaise could not maintain an action of trespass against the master. Macmanus v. Crickett. 1 *East.* 106. From that and the cases there cited and considered, the following general conclusions may be drawn; where the act of the servant is wilful, and such that an action of tres-

pass, and not an action upon the case, must be brought, the master is not responsible, unless the act is done by his command or assent.

But where mischief ensues from the negligence or unskilfulness of the servant, so that an action upon the case must be brought, and not an action of trespass, then the master will be answerable for the consequences in an action upon the case, if it is shewn that the servant is acting in the execution of his master's business and authority.

The law which obliges masters to answer for the negligence and unskilfulness of their servants, though oftentimes severe upon an innocent person, is founded upon principles of public policy, in order to induce masters to be careful in the choice of their servants, upon whom both their own security and that of others so greatly depends. And to prevent masters from being imposed upon in the characters of their servants, it is enacted by 32 Geo. III. c. 56. that if any person shall give a false character of a servant, or a false account of his former service; or if any servant shall give such false account, or shall bring a false character, or shall alter a certificate of a character, he shall, upon conviction before a justice of the peace, forfeit 20*l.* with 10*s.* costs. The informer is a competent witness. But if any servant will inform against an accomplice, he shall be acquitted.

An action was tried at the sittings after Trinity term 1792, at Guildhall, against a person who had knowingly given a false character of a man to the plaintiff, who was thereby induced to take him into his service. But this servant upon afterwards robbed his master of property to a great amount, for which he was executed; and the plaintiff recovered damages against the defendant to the extent of his loss. This was an action of great importance to the public, and there can be no doubt but it was founded in strict principles of law and justice.

CHAPTER THE FIFTEENTH.

OF HUSBAND AND WIFE.

THE second private relation of persons is that of marriage, which includes the reciprocal rights and duties of husband and wife; or, as most of our elder law books call them, of *baron* and *feme*. In the consideration of which I shall in the first place inquire, how marriages may be contracted or made; shall next point out the manner in which they may be dissolved; and shall, lastly, take a view of the legal effects and consequence of marriage.

I. OUR law considers marriage in no other light than as a civil contract. The *holiness* of the matrimonial state is left entirely to the ecclesiastical law: the temporal courts not having jurisdiction to consider unlawful marriage as a sin, but merely as a civil inconvenience. The punishment therefore, or annulling, of incestuous or other unscriptural marriages, is the province of the spiritual courts; which act *pro salute animae* [a]. And, taking it in this civil light, the law treats it as it does all other contracts: allowing it to be good and valid in all cases, where the parties at the time of making it were, in the first place, *willing* to contract; secondly, *able* to contract; and, lastly, actually *did* contract, in the proper forms and solemnities required by law.

[a] Salk. 121.

FIRST, they must be *willing* to contract. "*Consensus non* "*concubitus, facit nuptias*," is the maxim of the civil law in this case[b]: and it is adopted by the common lawyers[c], who indeed have borrowed (especially in ancient times) almost all their notions of the legitimacy of marriage from the canon and civil laws.

SECONDLY, they must be *able* to contract. In general, all persons are able to contract themselves in marriage, unless they labor under some particular disabilities, and incapacities. What those are, it will be here our business to inquire.

Now these disabilities are of two sorts: first, such as are canonical, and therefore sufficient by the ecclesiastical laws to avoid the marriage in the spiritual court; but these in our law only make the marriage voidable, and not *ipso facto* void, until sentence of nullity be obtained. Of this nature are pre-contract; consanguinity, or relation by blood; and affinity, or relation by marriage; and some particular corporal infirmities. And these canonical disabilities are either grounded upon the express words of the divine law, or are consequences plainly deducible from thence: it therefore being sinful in the persons who labor under them, to attempt to contract matrimony together, they are properly the object of the ecclesiastical magistrate's coercion; in order to separate the offenders, and inflict penance for the offence, *pro salute animarum*. But such marriages not being void *ab initio*, but voidable only by sentence of separation, they are esteemed valid to all civil purposes, unless such separation is actually made during the life of the parties. For, after the death of either of them, the courts of common law will not suffer the spiritual courts to declare such marriages to have been void; because such declaration cannot now tend to the reformation of the parties[d]. And therefore when a man had married his first wife's sister, and after her death the bishop's court was proceeding to annul the marriage

b Ff. 50. 17. 30. c Co. Litt. 33. d Ibid.

and bastardise the issue, the court of king's bench granted a prohibition *quoad hoc*; but permitted them to proceed to punish the husband for incest[e]. These canonical disabilities being entirely the province of the ecclesiastical courts, our books are perfectly silent concerning them. But there are a few statutes which serve as directories to those courts, of which it will be proper to take notice. By statute 32 Hen. VIII. c. 38. it is declared, that all persons may lawfully marry, but such as are prohibited by God's law (1); and that all marriages contracted by lawful persons in the face of the church, and consummate with bodily knowledge, and fruit of children, shall be indissoluble. And (because in the times of popery a great variety of degrees of kindred were made impediments to marriage, which impediments might however be bought off for money) it is declared by the same statute, that nothing (God's law excepted) shall impeach any marriage, but within the Levitical degrees (2); the farthest of which is that between uncle and niece[f]. By the same statute all impediments

e Salk. 548. f Gilb. Rep. 188.

(1) In this statute the prohibitions by God's law are not specified; but in the 25 Hen. VIII. c. 22. and 28 Hen. VIII. c. 7. the prohibited degrees are particularized. It is doubtful whether these two last statutes are in force. 2 *Burn. Ec.* 405. But so far they seem only to be declaratory of the Levitical law. The former declared null and void the marriage between Hen. VIII. and Catharine of Arragon, the widow of his eldest brother prince Arthur; for which a dispensation had been obtained from the pope.

The question respecting the validity of this dispensation produced that quarrel between the king and the pope, which ended in the abolition of the dominion of the latter in this country: and the inconstancy of that capricious king's affections accelerated the reformation of our religion.

(2) The prohibited degrees are all which are under the 4th degree of the civil law, except in the ascending and descending line, and by the course of nature it is scarcely a possible case that any one should ever marry his issue in the 4th degree; but between collaterals

arising from pre-contracts to other persons, were abolished and declared of none effect, unless they had been consummated with bodily knowledge: in which case the canon law holds such contract to be a marriage *de facto*. But this branch of the statute was repealed by statute 2 & 3 Edw. VI. c. 23. How far the act of 26 Geo. II. c. 33. (which prohibits all suits in ecclesiastical courts to compel a marriage, in consequence of any contract) may collaterally extend to revive this clause of Henry VIII's statute, and abolish the impediment of pre-contract, I leave to be considered by the canonists (3).

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it is universally true, that all who are in the fourth or any higher degree are permitted to marry; as first-cousins are in the fourth degree, and therefore may marry, and nephew and great aunt, or niece and great uncle, are also in the fourth degree, and may intermarry: and though a man may not marry his grand-mother, it is certainly true that he may marry her sister. *Gibs. Cod.* 413. See the computation of degrees by the civil law, 2 vol. p. 207. The same degrees by affinity are prohibited. Affinity always arises by the marriage of one of the parties so related; as a husband is related by affinity to all the *consanguinei* of his wife; and *vice versâ* the wife to the husband's *consanguinei*: for the husband and wife being considered one flesh, those who are related to the one by blood, are related to the other by affinity. *Gibs. Cod.* 412. Therefore a man after his wife's death cannot marry her sister, aunt, or niece. But the *consanguinei* of the husband are not at all related to the *consanguinei* of the wife. Hence two brothers may marry two sisters, or father and son a mother and daughter: or if a brother and sister marry two persons not related, and the brother and sister die, the widow and widower may intermarry; for though I am related to my wife's brother by affinity, I am not so to my wife's brother's wife, whom, if circumstances would admit, it would not be unlawful for me to marry.

(3) A contract *per verba de præsenti tempore* used to be considered in the ecclesiastical courts *ipsum matrimonium*, and if either party had afterwards married, this, as a second marriage, would have been annulled in the spiritual courts, and the first contract enforced. See an instance of it 4 *Co.* 29. But as this pre-engagement can no longer be carried into effect as a marriage, I think we may now be assured that

THE other sort of disabilities are those which are created, or at least enforced, by the municipal laws. And though some of them may be grounded on natural law, yet they are regarded by the laws of the land, not so much in the light of any moral offence, as on account of the civil inconveniences they draw after them. These civil disabilities make the contract void *ab initio*, and not merely voidable; [436] not that they dissolve a contract already formed, but they render the parties incapable of forming any contract at all: they do not put asunder those who are joined together, but they previously hinder the junction. And, if any persons under these legal incapacities come together, it is a meretricious, and not a matrimonial, union.

1. THE first of these legal disabilities is a prior marriage, or having another husband or wife living; in which case, besides the penalties consequent upon it as a felony (4), the second marriage is to all intents and purposes void[g]: polygamy being condemned both by the law of the new testament, and the policy of all prudent states, especially in these northern climates. And Justinian, even in the climate of modern Turkey, is express[h], that "*duas uxores eodem tempore habere non licet.*"

2. THE next legal disability is want of age. This is sufficient to avoid all other contracts, on account of the imbecility of judgment in the parties contracting; *a fortiori* therefore it ought to avoid this, the most important contract of any. Therefore if a boy under fourteen, or a girl under twelve years of age, marries, this marriage is only inchoate and imperfect; and, when either of them comes to the age of consent aforesaid, they may disagree and declare the mar-

g Bro. Abr. tit. Bastardy, pl. 8. h Inst. 1. 10. 6.

it will never more be an impediment to a subsequent marriage actually solemnized and consummated.

(4) See the exceptions, 4 vol. 164.

riage void, without any divorce or sentence in the spiritual court. This is founded on the civil law[i]. But the canon law pays a greater regard to the constitution, than the age, of the parties[k]; for if they are *habiles ad matrimonium*, it is a good marriage, whatever their age may be. And in our law it is so far a marriage, that, if at the age of consent they agree to continue together, they need not be married again[l]. If the husband be of years of discretion, and the wife under twelve, when she comes to years of discretion he may disagree as well as she may: for in contracts the obligation must be mutual; both must be bound, or neither (5): and so it is, *vice versa*, when the wife is of years of discretion, and the husband under[m].

3. ANOTHER incapacity arises from want of consent of parents or guardians. By the common law, [437] if the parties themselves were of the age of consent, there wanted no other concurrence to make the marriage valid: and this was agreeable to the canon law. But, by several statutes[n], penalties of 100*l.* are laid on every clergyman who marries a couple either without publication of banns (which

i Leon. Constit. 109.
k Decretal. l. 4. tit. 2. qu. 3.
l Co. Litt. 79.
m Ibid.
n 6 and 7 Will. III. c. 6. 7 and 8 W. III. c. 35. 10 Ann. c. 19.

(5) This proposition is too generally expressed; for there are various contracts between a person of full age and a minor, in which the former is bound and the latter is not. The authorities seem decisive that it is true with regard to the contract of marriage referred to the ages of 14 and 12; but it has also long been clearly settled that it is not true with regard to contracts for marriage referred to the minority under twenty-one.

For where there are mutual promises to marry between two persons, one of the age of 21 and the other under that age, the first is bound by the contract, and on the side of the minor it is voidable; or for a breach of the promise on the part of the person of full age, the minor may maintain an action and recover damages, but no action can be maintained for a similar breach of the contract on the side of the minor. Holt v. Ward Clarencieux, *Str.* 937. *S. C. Fitzg.* 175. 275.

may give notice to parents or guardians) or without a license, to obtain which the consent of parents or guardians must be sworn to (6). And by the statute 4 and 5 Ph. and M. c. 8. whosoever marries any woman child under the age of sixteen years, without consent of parents or guardians, shall be subject to fine, or five years imprisonment: and her estate during the husband's (7) life shall go to and be enjoyed by the next heir. The civil law indeed required the consent of the parent or tutor at all ages; unless the children were emancipated, or out of the parent's power[o]: and if such consent from the father was wanting, the marriage was null, and the children illegitimate[p], but the consent of the mother or guardians, if unreasonably withheld, might be redressed and supplied by the judge, or the president of the province[q]: and if the father was *non compos*, a similar remedy was given[r]. These provisions are adopted and imitated by the French and Hollanders, with this difference: that in France the sons cannot marry without consent of parents till thirty years of age, nor the daughters till twenty-five[s]; and in Holland, the sons are at their own disposal at twenty-five, and the daughters at twenty[t]. Thus hath stood, and thus at present stands, the law in other neighbouring countries. And it has lately been

o Ff. 23. 2, 2, and 18.
p Ff. 1. 5. 11.
q Cod. 5. 4. 1, and 20.
r Inst. 1. 10. 1.
s Domat. of dowries, sec. 2. Montesq. Sp. L. 23. 7.
t Vinnius in Inst. l. 1. t. 10.

(6) By the 26 Geo. II. c. 33. s. 7. if any clergyman shall marry a couple out of a church or a public chapel, where banns had been usually published before 1754, unless by special license from the archbishop; or shall marry them without a license, or publication of banns; he shall be guilty of felony, and shall be transported for fourteen years. And there have been instances of convictions for this offence.

(7) The construction of the statute seems to be, that it shall also go to the next heir during the life of the wife, even after the death of the husband. 1 *Brown. Ch. Rep.* 23. But the contrary has been decided in the exchequer. *Amb.* 73.

thought proper to introduce somewhat of the same policy into our laws by statute 26 Geo. II. c. 33. whereby it is enacted, that all marriages celebrated by license (for banns suppose notice) where either of the parties is under twenty-one, (not being a widow or widower, who are [438] supposed emancipated,) without the consent of the father, or, if he be not living, of the mother or guardians (8),

(8) A matter of such importance deserves to be more particularly stated: the party under age marrying by license, if a minor, and not having been married before, must have the consent of a father, if living; if he be dead, of a guardian of his *person, lawfully appointed*; if there be no such guardian, then of the mother if she is unmarried; if there be no mother unmarried, then of a guardian appointed by the court of chancery.

I have been inclined to think that the words *lawfully appointed* comprehend a guardian appointed by the father, a guardian appointed by the court of chancery, and also, where such a guardian can exist, a socage guardian, he being a guardian of the person of the ward appointed by the law itself.

It is true, this guardianship continues only till the ward attains the age of 14, and the mother in all cases, except when she is heir to her own son, that is when she would be heir to her husband without issue, will be the socage guardian; but if the parents were both dead, and there was a socage guardian, who consented to the marriage of a girl under 14, would not this marriage be valid if solemnized by a license? Here is the consent of a guardian of the person of the party appointed by the law, and would not this be within the meaning of the words *lawfully appointed?* The consent of the guardian appointed by the court of chancery being expressly mentioned in the last instance, seems to afford some inference that that species of guardian was not included within the words *lawfully appointed*; but it affords a very slight inference indeed, for though he was included in the general words, yet it was absolutely necessary to name him expressly again; and the statute in effect thereby declares, that if none of those persons previously described are in existence, then, in order to give validity to a marriage by license, a guardian must be appointed by the court of chancery, for the express purpose of giving his consent to it. And this is by no means repugnant with the supposition, that, if a guardian is appointed by the court of chancery after the father's death, his consent shall precede that of the mother, he being a guardian lawfully appointed.

shall be absolutely void. A like provision is made as in the civil law, where the mother or guardian is *non compos*, beyond sea, or unreasonably froward, to dispense with such consent at the discretion of the lord chancellor: but no provision is made, in case the father should labor under any mental or other incapacity (9). Much may be, and much has been said, both for and against this innovation upon our ancient laws and constitution. On the one hand, it prevents the clandestine marriages of minors, which are often a terrible inconvenience to those private families wherein they happen. On the other hand, restraints upon marriages, especially among the lower class, are evidently detrimental to the public, by hindering the increase of the people; and to religion and morality, by encouraging licentiousness and debauchery among the single of both sexes, and thereby destroying one end of society and government, which is *concubitu prohibere vago*. And of this last inconvenience the Roman laws were so sensible, that at the same time that they forbad marriage without the consent of parents or guardians, they were less rigorous upon that very account with

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If those who composed the marriage act, had meant only to interpose a guardian appointed by the father between the father and the mother, surely they would have used the specific words *appointed by the father*, rather than the general words *lawfully appointed*. I have thought it proper to make these observations, because I see that sir William Scott, in the case of Horner v. Liddiard, p. 180. construes the words *a guardian lawfully appointed*, to mean a guardian appointed by the father only. He cites no authority for this construction. For the reasons I have assigned, I hope I may, without offence, presume to question, in this instance, the opinion of so learned and respectable a judge. See p. 459. n. 11. *post*.

(9) The words of the statute are, "if any such guardian, or mother, or *any of them*, whose consent is made necessary, shall be *non compos mentis*, &c." Under the words *any of them*, I conceive that the chancellor would think himself enabled to consent for a father, whose consent it was thus impossible to obtain.

regard to other restraints: for, if a parent did not provide a husband for his daughter, by the time she arrived at the age of twenty-five, and she afterwards made a slip in her conduct, he was not allowed to disinherit her upon that account, "*quia* "*non sua culpa, sed parentum, id commisisse cognoscitur* [u]."

4. A FOURTH incapacity is want of reason; without a competent share of which, as no other so neither can the matrimonial contract be valid [w]. It was formerly adjudged, that the issue of an idiot was legitimate, and consequently that his marriage was valid. A strange determination! since consent is absolutely requisite to matrimony, and neither idiots nor lunatics are capable of consenting to any thing. And therefore the civil law judged much more sensibly when it made such deprivations of reason a previous impediment; though not a cause of divorce, if they happened after marriage [x]. And modern resolutions have [439] adhered to the reason of the civil law, by determining [y] that the marriage of a lunatic, not being in a lucid interval, was absolutely void. But as it might be difficult to prove the exact state of the party's mind at the actual celebration of the nuptials, upon this account (concurring with some private family [z] reasons) the statute 15 Geo. II. c. 30. has provided that the marriage of lunatics and persons under phrenzies (if found lunatics under a commission, or committed to the care of trustees by any act of parliament) before they are declared of sound mind by the lord chancellor or the majority of such trustees, shall be totally void (10).

u Nov. 115. sec. 11.
w 1 Roll. Abr. 357.
x Ff. 23. tit. 1. l. 8. et tit. 2. l. 16.
y Morrison's case, *coram Delegat.*
z See private sts 23 Geo. II. c. 6,

(10) Till the 2 & 3 Edw. VI. c. 21. the clergy in this country were prohibited to marry, by various laws and canons; a statute in the 31 Hen. VIII. c. 14. having even made it felony. But the legislature by

LASTLY, the parties must not only be willing and able to contract, but actually must contract themselves in due form of law, to make it a good civil marriage. Any contract made, *per verba de praesenti*, or in words of the present tense, and in case of cohabitation *per verba de futuro* also, between persons able to contract, was before the late act deemed a valid marriage to many purposes; and the parties might be com-

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2 & 3 Edw. VI. c. 21. repealed the laws and canons which imposed that severe restriction upon the clergy, and granted them the same indulgence that the laity enjoyed. The preamble to that statute, as almost all the preambles to the statutes in that short reign, is expressed with a remarkable degree of eloquence. "Although it were not only "better for the estimation of priests and other ministers in the church "of God, to live chaste, sole, and separate from the company of women, "and the bond of marriage; but also thereby they might the better "intend to the administration of the gospel, and be less intricated and "troubled with the charge of household, being free and unburdened "from the care and cost of finding wife and children; and that it were "most to be wished, that they would willingly and of their selves en- "deavour themselves to a perpetual chastity and abstinence from the "use of women: yet, forasmuch as the contrary hath rather been seen, "and such uncleanliness of living, and other great inconveniences not "meet to be rehearsed, have followed of compelled chastity, and of "such laws as have prohibited those the godly use of marriage; it were "better, and rather to be suffered in the commonwealth, that those "which could not contain, should, after the counsel of scripture, live "in holy marriage, than feignedly abuse with worse enormity, outward "chastity, or single life." But this statute, like all the other reforms in the church, was repealed by queen Mary, and it was not revived again till the 1 Ja. I. c. 25. though the thirty-nine articles had been passed in convocation in the fifth year of the reign of queen Elizabeth; the 32d of which declares, that it is lawful for the bishops, priests, and deacons, as for all other christian men, to marry at their own discretion.

The clerks in chancery, though laymen, were not allowed to marry till the 14 & 15 Hen. VIII. c. 8. And no lay doctor of civil law, if he was married, could exercise any ecclesiastical jurisdiction till 37 Hen. VIII. c. 7. 2 *Burn. Ec. L.* 418.

pelled in the spiritual courts to celebrate it *in facie ecclesiae*. But these verbal contracts are now of no force, to compel a future marriage [a]. Neither is any marriage at present valid, that is not celebrated in some parish church or public chapel (11) unless by dispensation from the arch-bishop of Canterbury. It must also be preceded by publication of banns, or by license from the spiritual judge. Many other formalities are likewise prescribed by the act; the neglect of which, though penal, does not invalidate the marriage. It is held to be also essential to a marriage, that it be performed by a person in orders [b]; though the intervention of a priest to solemnize this contract is merely *juris positivi*, and not *juris naturalis aut divini*: it being said that pope Innocent the third was the first who ordained the celebration of marriage in the church [c]; before which it was totally a civil contract. And, in the times of the grand rebellion, all marriages were performed by the justices of the peace; and these marriages were declared valid, without any fresh solemnization, by statute 12 Car. II. c. 33. But, as the law now stands, we may upon the whole collect, that no marriage by the temporal law is *ipso facto void*, that is celebrated by a person in orders, in a parish church or public chapel (or elsewhere, by special dispensation)—in pursuance of banns or a license,—between single [440]

a Stat. 26 Geo. II. c. 33. b Salk. 119. c Moor. 170.

(11) The marriage act requires, that the marriage shall be celebrated in some parish church or public chapel, where banns had been usually published; *i. e.* before the 25th of March 1754. In consequence of this construction, the court of king's bench were obliged to declare a marriage void, which had been solemnized in a chapel erected in 1765. (*Doug.* 659.) And as there were many marriages equally defective, an act of parliament was immediately passed, which legalized all marriages celebrated in such churches or chapels, since the passing of the marriage act; and it also indemnified the clergymen from the penalties they had incurred. 21 *Geo. III. c.* 53.

persons,—consenting,—of sound mind,—and of the age of twenty-one years;—or of the age of fourteen in males and twelve in females, with consent of parents or guardians, or without it, in case of widowhood. And no marriage is *voidable* by the ecclesiastical law, after the death of either of the parties, nor during their lives, unless for the canonical impediments of pre-contract, if that indeed still exists; of consanguinity; and of affinity, or corporal imbecility, subsisting previous to the marriage.

II. I AM next to consider the manner in which marriages may be dissolved; and this is either by death, or divorce. There are two kinds of divorce, the one total, the other partial; the one *a vinculo matrimonii*, the other merely *a mensa et thoro*. The total divorce, *a vinculo matrimonii*, must be for some of the canonical causes of impediment before mentioned; and those, existing *before* the marriage, as is always the case in consanguinity; not supervenient, or arising *afterwards*, as may be the case in affinity or corporal imbecility (12). For in cases of total divorce, the marriage is declared null, as having been absolutely unlawful *ab initio*; and the parties are therefore separated *pro salute animarum*: for which reason, as was before observed, no divorce can be obtained, but during the life of the parties. The issue of such marriage as is thus entirely dissolved, are bastards[d].

DIVORCE *a mensa et thoro* is when the marriage is just and lawful *ab initio*, and therefore the law is tender of dissolving

[d] Co. Litt. 235.

(12) Corporal imbecility may arise after the marriage, which will not then vacate the marriage, because there was no fraud in the original contract; and one of the ends of marriage, *viz.* the legitimate procreation of children, may have been answered: but no kindred by affinity can happen subsequently to the marriage; for as affinity always depends upon the previous marriage of one of the parties so related, if a husband and wife are not so related at the time of the marriage, they never can become so afterwards.

it; but for some supervenient cause, it becomes improper or impossible for the parties to live together: as in the case of intolerable ill temper, or adultery, in either of the parties. For the canon law, which the common law follows in this case, deems so highly and with such mysterious reverence of the nuptial tie, that it will not allow it to be unloosed for any cause whatsoever, that arises after the union is made. And this is said to be built on the divine revealed law; though that expressly assigns incontinence as a cause, and indeed the only cause, why a man may put away his wife and marry another[e]. The civil law, which is partly of pagan original, allows many causes of absolute divorce; and some of them pretty severe ones: (as if a wife goes to the theatre or the public games, without the knowledge and consent of the husband[f],) but among them adultery is the principal, and with reason named the first[g]. But with us in England adultery is only a cause of separation from bed and board[h]: for which the best reason that can be given is, that if divorces were allowed to depend upon a matter within the power of either of the parties, they would probably be extremely frequent; as was the case when divorces were allowed for canonical disabilities, on the mere confession of the parties[i], which is now prohibited by the canons[k] (13). However, divorces, *a vin-*

e Matt. xix. 9.
f Nov. 117.
g Cod. 5. 17. 8.
h Moor. 683.
i 2 Mod. 314.
k Can. 1603. c. 105.

(13) A husband cannot obtain a divorce in the ecclesiastical courts for the adultery of his wife if she recriminates, and can prove that he also has been unfaithful to the marriage vow; this seems to be founded on the following rational precept of the civil law, *judex adulterii ante oculos habere debet et inquirere, an maritus pudicè vivens, mulieri quoque bonos mores colendi autor fuerit. Per iniquum enim videtur esse, ut pudicitiam vir ab uxore exigat, quam ipse non exhibeat.* Ff. 48. 5. 13.

culo matrimonii, for adultery, have of late years been frequently granted by act of parliament (14).

In case of divorce *a mensa et thoro*, the law allows alimony to the wife: which is that allowance, which is made to a woman for her support out of the husband's estate: being settled at the discretion of the ecclesiastical judge, on consideration of all the circumstances of the case. This is sometimes called her *estovers*; for which, if he refuses payment, there is (besides the ordinary process of excommunication) a writ at common law *de estoveriis habendis*, in order to recover it[l]. It is generally proportioned to the [442] rank and quality of the parties. But in case of elopement, and living with an adulterer, the law allows her no alimony[m].

l 1 Lev. 6. m Cowel. tit. Alimony.

(14) To prevent divorces *a vinculo matrimonii* from being obtained in parliament by fraud and collusion, the two houses not only examine witnesses to be convinced of the adultery of the wife, but they require also that the husband shall have obtained a sentence of divorce in the spiritual courts, and a verdict with damages in a court of law from some one who has had criminal intercourse with the wife.

This is not a standing order of the house of lords, but it is adopted as a rule of caution, and it may be dispensed with, where the circumstances are such that the adultery of the wife can be proved by satisfactory evidence, and at the same time it is impossible for the husband to obtain a verdict in an action at law.

It was dispensed with in the case of a naval officer, whose wife had been brought to bed of one child, in his absence upon duty abroad; and upon his return was far advanced in her pregnancy with a second, and where he could not discover the father. So in another case, where a married woman had gone to France, was divorced there, and had married a Frenchman.

It would also be dispensed with, if the adulterer should die before the husband could obtain a verdict.

III. Having thus shewn how marriages may be made, or dissolved, I come now, lastly, to speak of the legal consequences of such making, or dissolution.

By marriage, the husband and wife are one person in law[n], that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing; and is therefore called in our law-french a *feme-covert*, *foemina viro co-operta*; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture* (15). Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage. I speak not at present of the rights of property, but of such as are merely *personal*. For this reason, a man cannot grant any thing to his wife, or enter into covenant with her[o], for the grant would be to suppose her separate existence: and to covenant with her, would be only to covenant with himself (16): and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage[p]. A woman indeed may be attorney for her husband[q]; for that implies no separation

n Co. Litt. 112.
o Ibid.
p Cro. Car. 551.
q F. N. B. 27.

(15) Whatever may be the origin of *feme-covert*, it is not perhaps unworthy of observation, that it nearly corresponds in its significations to the Latin word *nupta*; for that is derived *a nubendo*, i. e. *tegendo*, because the modesty of the bride, it is said, was so much consulted by the Romans upon that delicate occasion, that she was led to her husband's home *covered* with a veil.

(16) But the husband may grant to the wife by the intervention of trustees; *Harg. Co. Litt.* 30; and he may surrender a copyhold to her use. 4 *Co.* 29.

from, but is rather a representation of, her lord. And a husband may also bequeath any thing to his wife by will; for that cannot take effect till the coverture is determined by his death [r]. The husband is bound to provide his wife with necessaries by law, as much as himself: and if she contracts debts for them, he is obliged to pay them [s]; but, for any thing besides necessaries, he is not chargeable [t] (17). Also if a wife elopes, and lives with another man, the [443] husband is not chargeable even for necessaries [u]; at least if the person who furnishes them is sufficiently apprized of her elopement [w]. If the wife be indebted before marriage, the husband is bound afterwards to pay the debt; for he has adopted her and her circumstances together [x] (18). If the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, and in his name, as well as her own [y]: neither can she

r Co. Litt. 112.
s Salk. 118.
t 1 Sid. 120.
u Stra. 647.
w 1 Lev. 5.
x 3 Mod. 186.
y Salk. 119. 1 Roll. Abr. 347.

(17) What are necessaries must be ascertained by a jury from the rank and circumstances of the husband.

Lord Kenyon has held at *nisi prius*, that if a husband gives notice to a particular tradesman not to deal with his wife unless she bring ready money, that tradesman cannot afterwards maintain an action against the husband even for necessaries.

(18) But though the husband has had a great fortune with his wife, if she dies before him, he is not liable to pay her debts contracted before marriage, either in law or equity, unless there is some part of her personal property which he did not reduce into his possession before her death, which he must afterwards recover as her administrator; and to the extent of the value of that property, he will be liable to pay his wife's debts, *dum sola*, which remained undischarged during the coverture. 1 *P. Wms.* 468.

be sued, without making the husband a defendant [z]. There is indeed one case where the wife shall sue and be sued as a feme sole, *viz.* where the husband has abjured the realm, or is banished [a], for then he is dead in law (19); and, the husband being thus disabled to sue for or defend the wife, it would be most unreasonable if she had no remedy, or could make no defence at all. In criminal prosecutions, it is true, the wife may be indicted and punished separately [b]; for the union is only a civil union. But, in trials of any sort, they are not allowed to be evidence for, or against, each other [c]: partly because it is impossible their testimony should be indifferent; but principally because of the union of person: and therefore, if they were admitted to be witnesses *for* each other, they would contradict one maxim of law, "*nemo in propria causa* "*testis esse debet*;" and if *against* each other, they would con-

z Bro. Error. 173. 1 Leon. 312. 1 Sid. 120. This was also the practice in the courts of Athens. (Pot. Antiqu. b. 1. c. 21.)

a Co. Litt. 133.

b 1 Hawk. P. C. 3.

c 2 Hawk. P. C. 431

(19) This principle had been extended to a case which was thought analogous to that, where the husband was considered dead in law, *viz.* where a married woman was separated from her husband, and was allowed a separate maintenance by deed; it having been decided by the court of king's bench in several instances, that, if the wife under such circumstances contracted debts, she was liable to be sued as a *feme sole*. 1 *T. R.* 5.

But a similar case has since been argued before all the judges, and their unanimous judgment was pronounced by lord Kenyon, in the conclusion of which he declares, that "we find no authority in the books to "shew that a man and his wife can, by agreement between themselves, "change their legal capacities and characters; or that a woman may be "sued as a *feme sole*, while the relation of marriage subsists, and she "and her husband are living in this kingdom." Marshall v. Rutton. 8 *T. R.* 545.

But it is still held, that, if the wife has a separate maintenance, and lives apart from her husband by agreement, the husband will not be liable for necessaries, for this is equivalent to notice to the world not

tradict another maxim, "*nemo tenetur seipsum accusare* (20)." But, where the offence is directly against the person of the wife, this rule has been usually dispensed with[d]: and therefore, by statute 3 Hen. VII. c. 2. in case a woman be forcibly taken away, and married, she may be a witness against such her husband, in order to convict him of felony. For in this case she can with no propriety be reckoned his wife; because a main ingredient, her consent, was wanting to the contract:

d State trials. vol. 1. Lord Audley's case. Stra. 633.

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to trust her upon his credit; and where she has consented to support herself upon a certain allowance, what she procures beyond upon the credit of her husband could not be considered as necessaries for her in that condition.

(20) The union of person is scarce sufficient to account for this rule of law; for the confessions of the husband or wife are no evidence against the other, yet the confessions of the party are legal evidence: but the better reason seems to be that, which is generally assigned, *viz.* if a wife were a witness for her husband, she would be under a strong temptation to commit perjury; and if against her husband, it would be contrary to the policy of marriage, and might create much domestic dissention and unhappiness; so *vice versa* of the husband. *Bull. N. P.* 286. But this rule, I should think, ought to be confined to cases where he husband or wife is a party in the action or prosecution; yet in one case it seems to have been held, that a wife shall not be called in any instance to give evidence, even tending to criminate her husband. 2 *T. R.* 263. If this be true, a plaintiff or prosecutor may have the benefit of the testimony of the one, and the defendant or prisoner cannot have the benefit of the testimony of the other; because the evidence of the latter would tend to charge the former with perjury. Surely in such cases, where the interests of strangers are concerned, the furtherance of public justice is a consideration far superior to the policy of marriage, or the domestic strifes of the witnesses.

In all cases where the crime is a violence done to the person of the other, the husband may be evidence against the wife, and the wife against the husband. This was held by all the judges in the case of Jagger, who was convicted at York upon the evidence of his wife of an attempt to poison her. Spring Assizes, 1797.

and also there is another maxim of law that no man shall take advantage of his own wrong: which the ravisher here would do, if by forcibly marrying a woman, he could prevent her from being a witness, who is perhaps the only witness, to that very fact. [444]

In the civil law the husband and the wife are considered as two distinct persons; and may have separate estates, contracts, debts, and injuries[e]: and therefore, in our ecclesiastical courts, a woman may sue and be sued without her husband[f] (21).

But, though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion. And therefore all deeds executed, and acts done, by her, during her coverture, are void; except it be a fine, or the like matter of record, in which case she must be solely and secretly examined, to learn if her act be voluntary[g]. She cannot by will devise lands to her husband, unless under special circumstances; for at the time of making it she is supposed to be under his coercion[h]. And in some felonies, and other inferior crimes, committed by her, through constraint of her husband, the law excuses her[i] (22): but this extends not to treason or murder.

The husband also (by the old law) might give his wife moderate correction[k]. For, as he is to answer for her mis-

e Cod. 4. 12. 1.
f 2 Roll. Abr. 293.
g Litt. sec. 669. 670.
h Co. Litt. 112.
i 1 Hawk. P. C. 2.
k 1 Hawk. P. C. 130.

(21) A feme covert having a separate estate, may, in a court of equity, be sued as a feme sole, and be proceeded against without her husband; for, in respect of her separate estate, she is looked upon as a feme sole. 2 *Ver.* 614. And in a court of equity, baron and feme are considered as two distinct persons, and therefore a wife by her prochein amy, may sue her own husband. 3 *Cox. P. Wms.* 39.

(22) The law excuses the wife, perhaps, in no crimes inferior to felony. See this subject considered in the 4th vol. p. 29. n. 4.

behaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds[l], and the husband was prohibited from using any violence to his wife, *aliter quam ad virum, ex causa regiminis et castigationis uxoris suae, licite et rationabiliter pertinet*[m]. The civil [445] law gave the husband the same, or a larger, authority over his wife: allowing him, for some misdemesnors, *flagellis et fustibus acriter verberare uxorem;* for others, only *modicam castigationem adhibere*[n]. But, with us in the politer reign of Charles the second, this power of correction began to be doubted[o]: and a wife may now have security of the peace against her husband[p]; or, in return, a husband against his wife[q]. Yet the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege: and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehaviour[r].

THESE are the chief legal effects of marriage during the coverture; upon which we may observe, that even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favorite is the female sex of the laws of England (23).

l 1 Moor. 874.
m F. N. B. 80.
n Nov. 117. c. 14. et Van Leeuwen in loc.
o 1 Sid. 113. 3 Keb. 433.
p 2 Lev. 128.
q Stra. 1207.
r Stra. 478. 875.

(23) Nothing, I apprehend, would more conciliate the good-will of the student in favor of the laws of England, than the persuasion that they had shewn a partiality to the female sex. But I am not so much in love with my subject as to be inclined to leave it in possession of a glory which it may not justly deserve. In addition to what has been observed in this chapter, by the learned Commentator, I shall here

state some of the principal differences in the English law, respecting the two sexes; and I shall leave it to the reader to determine on which side is the balance, and how far this compliment is supported by truth.

Husband and wife, in the language of the law, are styled *baron* and *feme*: the word baron, or lord, attributes to the husband not a very courteous superiority. But we might be inclined to think this merely an unmeaning technical phrase, if we did not recollect, that if the baron kills his feme, it is the same as if he had killed a stranger, or any other person; but if the feme kills her baron, it is regarded by the laws as a much more atrocious crime; as she not only breaks through the restraints of humanity and conjugal affection, but throws off all subjection to the authority of her husband. And therefore the law denominates her crime a species of treason, and condemns her to the same punishment as if she had killed the king. And for every species of treason, (though in petit treason the punishment of men was only to be drawn and hanged,) till the 30 Geo. III. c. 48. the sentence of women was to be drawn and burnt alive. 4 Vol. 204.

By the common law all women were denied the benefit of clergy; and till the 3 and 4 W. & M. c. 9. they received sentence of death, and might have been executed, for the first offence in simple larceny, bigamy, manslaughter, &c. however learned they were, merely because their sex precluded the possibility of their taking holy orders; though a man, who could read, was for the same crime subject only to burning in the hand and a few months imprisonment. 4 Vol. 369.

These are the principal distinctions in criminal matters; now let us see how the account stands with regard to civil rights.

Intestate personal property is equally divided between males and females; but a son, though younger than all his sisters, is heir to the whole of real property.

A woman's personal property, by marriage, becomes absolutely her husband's, which at his death he may leave entirely away from her; but if he dies without will, she is entitled to one-third of his personal property, if he has children; if not, to one-half. In the province of York, to four-ninths or three fourths.

By the marriage, the husband is absolutely master of the profits of the wife's lands during the coverture; and if he has had a living child, and survives the wife, he retains the whole of those lands, if they are estates of inheritance, during his life: but the wife is entitled only to dower, or one-third, if she survives, out of the husband's estates of inheritance; but this she has, whether she has had a child or not.

But a husband can be tenant by the courtesy of the trust estates of the wife, though the wife cannot be endowed of the trust estates of the husband. 3 *P. Wms.* 229.

With regard to the property of women, there is taxation without representation; for they pay taxes without having the liberty of voting for representatives; and indeed there seems at present no substantial reason why single women should be denied this privilege. Though the chastity of women is protected from violence, yet a parent can have no reparation, by our law, from the seducer of his daughter's virtue, but by stating that she is his servant, and that by the consequences of the seduction, he is deprived of the benefit of her labor: or where the seducer, at the same time, is a trespasser upon the close or premises of the parent. But when by such forced circumstances the law can take cognisance of the offence, juries disregard the pretended injury, and give damages commensurate to the wounded feelings of a parent.

Female virtue, by the temporal law, is perfectly exposed to the slanders of malignity and falsehood; for any one may proclaim in conversation, that the purest maid, or the chastest matron, is the most meretricious and incontinent of women, with impunity, or free from the animadversions of the temporal courts. Thus female honor, which is dearer to the sex than their lives, is left by the common law to be the sport of an abandoned calumniator. 3 Vol. 125.

From this impartial statement of the account, I fear there is little reason to pay a compliment to our laws for their respect and favor to the female sex.

CHAPTER THE SIXTEENTH.

OF PARENT AND CHILD.

THE next, and the most universal relation in nature, is immediately derived from the preceding, being that between parent and child.

CHILDREN are of two sorts; legitimate, and spurious, or bastards; each of which we shall consider in their order; and, first, of legitimate children.

I. A LEGITIMATE child is he that is born in lawful wedlock, or within a competent time afterwards. "*Pater est "quem nuptiae demonstrant,*" is the rule of the civil law[a]; and this holds with the civilians, whether the nuptials happen before, or after, the birth of the child. With us in England the rule is narrowed, for the nuptials must be precedent to the birth; of which more will be said when we come to consider the case of bastardy. At present let us inquire into, 1. The legal duties of parents to their legitimate children. 2. Their power over them. 3. The duties of such children to their parents.

1. AND, first, the duties of parents, to legitimate children: which principally consist in three particulars; their maintenance, their protection, and their education.

THE duty of parents to provide for the *maintenance* of their children, is a principle of natural law; an obligation, says

a Ff. 2. 4. 5.

Puffendorf[b], laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave their children life, that they might afterwards see them perish. By begetting them therefore, they have entered into a voluntary obligation, to endeavour, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have a perfect *right* of receiving maintenance from their parents. And the president Montesquieu[c] has a very just observation upon this head: that the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children: for that ascertains and makes known the person who is bound to fulfil this obligation: whereas, in promiscuous and illicit conjunctions, the father is unknown; and the mother finds a thousand obstacles in her way; shame, remorse, the constraint of her sex, and the rigor of laws; that stifle her inclinations to perform this duty: and besides, she generally wants ability.

THE municipal laws of all well-regulated states have taken care to enforce this duty: though providence has done it more effectually than any laws, by implanting in the breast of every parent that natural στοργη, or insuperable degree of affection, which not even the deformity of person or mind, not even the wickedness, ingratitude, and rebellion of children, can totally suppress or extinguish.

THE civil law[d] obliges the parent to provide maintenance for his child; and, if he refuses, "*judex de ea re cognoscet.*" Nay, it carries this matter so far, that it will not suffer a parent at his death totally to disinherit his child, [448] without expressly giving his reason for so doing; and there are fourteen such reasons reckoned up[e], which may justify such disinherison. If the parent alleged

b L. of N. l. 4. c. 11. c Sp. L. b. 23. c. 2. d Ff. 25. 3. 5. e Nov. 115.

no reason, or a bad, or a false one, the child might set the will aside, *tanquam testamentum inofficiosum*, a testament contrary to the natural duty of the parent. And it is remarkable under what color the children were to move for relief in such a case: by suggesting that the parent had lost the use of his reason, when he made the *inofficious* testament. And this, as Puffendorf observes[f], was not to bring into dispute the testator's power of disinheriting his own offspring; but to examine the motives upon which he did it: and, if they were found defective in reason, then to set them aside. But perhaps this is going rather too far; every man has, or ought to have, by the laws of society, a power over his own property: and, as Grotius very well distinguishes[g], natural right obliges to give a *necessary* maintenance to children; but what is more than that they have no other right to, than as it is given them by the favor of their parents, or the positive constitutions of the municipal law.

LET us next see what provision our own laws have made for this natural duty. It is a principle of law[h], that there is an obligation on every man to provide for those descended from his loins; and the manner, in which this obligation shall be performed, is thus pointed out[i]. The father, and mother, grandfather, and grandmother of poor impotent persons shall maintain them at their own charges, if of sufficient ability, according as the quarter session shall direct (1): and

f l. 4. c. 11. sec. 7.
g de j. b. and p. l. 2. c. 7. n. 3.
h Raym. 500.
i Stat. 43 Eliz. c. 2.

(1) That is, they may respectively be compelled to allow each other 20*s.* a month, or 13*l.* a year; but that is the greatest allowance which a son can be obliged to make an aged parent, or a father a legitimate child, by our law.

Any two justices may make this order of allowance, which is in fact in aid of the parish to which the indigent person belongs. The relation, on whom the order is made, may appeal to the justices in sessions, who, upon evidence, and the consideration of the circumstances and ability of the party, can reduce the allowance, or discharge the order.

if a parent runs away[k], and leaves his children, the churchwardens and overseers of the parish shall seise his rents, goods, and chattels, and dispose of them toward their relief. By the interpretations which the courts of law have made upon these statutes, if a mother or grandmother marries again, and was before such second marriage of sufficient ability to keep the child, the husband shall be charged to maintain it[l]: for this being a debt of hers, when single, shall like others extend to charge the husband (2). But at her death, the relation being dissolved, the husband is under no farther obligation.

[449]

No person is bound to provide a maintenance for his issue, unless where the children are impotent and unable to work, either through infancy, disease, or accident; and then is only obliged to find them with necessaries, the penalty on refusal being no more than 20*s*. a month. For the policy of our laws, which are ever watchful to promote industry, did not mean to compel a father to maintain his idle and lazy children in ease and indolence: but thought it unjust to oblige the parent, against his will, to provide them with superfluities, and other indulgences of fortune; imagining they might trust to the impulse of nature, if the children were deserving of such favors. Yet, as nothing is so apt to stifle the calls of nature as religious bigotry, it is enacted[m], that if any popish parent shall refuse to allow his protestant

k Stat. 5 Geo. I. c. 8.
l 1 Styles. 283. 2 Bulstr. 346.
m Stat. 11 and 12 W. III. c. 4.

(2) It has lately been decided, that the authorities here relied upon by the learned Commentator never were law; and that a husband is not bound, even whilst his wife is alive, to support her parents, or her children, by a former husband, or any other relation; for the statute 43 Eliz. c. 2. extends only to relations by blood. 4 *T. R.* 118. But I conceive if the wife had separate property, an order might be made upon her alone, to support her children and relations.

child a fitting maintenance, with a view to compel him to change his religion, the lord chancellor shall by order of court constrain him to do what is just and reasonable. But this did not extend to persons of another religion, of no less bitterness and bigotry than the popish: and therefore in the very next year we find an instance of a jew of immense riches, whose only daughter having embraced christianity, he turned her out of doors; and on her application for relief, it was held she was entitled to none[n] (3). But this gave occasion[o] to another statute[p], which ordains, that if jewish parents refuse to allow their protestant children a fitting maintenance suitable to the fortune of the parent, the lord chancellor on complaint may make such order therein as he shall see proper.

OUR law has made no provision to prevent the disinheriting of children by will: leaving every man's property in his own disposal, upon a principle of liberty in this, as well as every other, action: though perhaps it had not been amiss, if the parent had been bound to leave them at the least a necessary subsistence. Indeed, among persons of any rank or fortune, a competence is generally provided for younger children, and the bulk of the estate settled upon the eldest, by the marriage-articles. Heirs also, and children, are favorites of our courts of justice, and cannot be disinherited by any dubious or ambiguous words; there being required the utmost certainty of the testator's intentions to take away the right of an heir[q]. [450]

FROM the duty of maintenance we may easily pass to that of *protection*, which is also a natural duty, but rather permitted

n Lord Raym. 699.
o Com. Journ. 18 Feb. 12 Mar. 1701.
p 1 Ann. st. 1. c. 30.
q 1 Lev. 130.

(3) It was not held that she was entitled to none, because she was the daughter of a jew, but because the order did not state that she was poor, or likely to become chargeable to the parish.

than enjoined by any municipal laws; nature, in this respect, working so strongly as to need rather a check than a spur. A parent may, by our laws, maintain and uphold his children in their law-suits, without being guilty of the legal crime of maintaining quarrels[r]. A parent may also justify an assault and battery in defence of the persons of his children[s]: nay, where a man's son was beaten by another boy, and the father went near a mile to find him, and there revenged his son's quarrel by beating the other boy, of which beating he afterwards unfortunately died; it was not held to be murder, but manslaughter merely[t]. Such indulgence does the law shew to the frailty of human nature, and the workings of parental affection.

THE last duty of parents to their children is that of giving them an *education* suitable to their station in life: a duty pointed out by reason, and of far the greatest importance of any. For, as Puffendorf very well observes[u], it is not easy to [451] imagine or allow, that a parent has conferred any considerable benefit upon his child by bringing him into the world; if he afterwards entirely neglects his culture and education, and suffers him to grow up like a mere beast, to lead a life useless to others, and shameful to himself. Yet the municipal laws of most countries seem to be defective in this point, by not constraining the parent to bestow a proper education upon his children. Perhaps they thought it punishment enough to leave the parent, who neglects the instruction of his family, to labor under those griefs and inconveniencies, which his family, so uninstructed, will be sure to bring upon him. Our laws, though their defects in this particular cannot be denied, have in one instance made a wise provision for breeding up the rising generation: since the poor and laborious part of the community, when past the age of nurture, are taken out of the hands of their parents, by the statutes for apprenticing poor children[w]; and are placed out by the public in such a

r 2 Inst. 564.
s 1 Hawk. P. C. 131.
t Cro. Jac. 296. 1 Hawk. P. C. 83.
u L. of N. b. 6. c. 2. sec. 12.
w See pag. 426.

manner, as may render their abilities, in their several stations, of the greatest advantage to the commonwealth. The rich indeed are left at their own option, whether they will breed up their children to be ornaments or disgraces to their family. Yet in one case, that of religion, they are under peculiar restrictions: for[x] it is provided, that if any person sends any child under his government beyond the seas, either to prevent its good education in England, or in order to enter into or reside in any popish college, or to be instructed, persuaded, or strengthened in the popish religion; in such case, besides the disabilities incurred by the child so sent, the parent or person sending shall forfeit 100*l.* which[y] shall go to the sole use and benefit of him that shall discover the offence. And[z] if any parent, or other, shall send or convey any person beyond sea, to enter into, or be resident in, or trained up in, any priory, abbey, nunnery, popish university, college, or school, or house of jesuits, or priests, or in any private popish family, in order to be instructed, persuaded, or confirmed in the popish religion; or shall contribute [452] any thing towards their maintenance when abroad by any pretext whatever, the person both sending and sent shall be disabled to sue in law or equity, or to be executor or administrator to any person, or to enjoy any legacy or deed of gift, or to bear any office in the realm, and shall forfeit all his goods and chattels, and likewise all his real estate for life (4).

2. The *power* of parents over their children is derived from the former consideration, their duty: this authority being given them, partly to enable the parent more effectually to

x Stat. 1 Jac. I. c. 4. and 3 Jac. I. c. 5.
y Stat. 11 and 12 W. III. c. 4.
z Stat. 3 Car. I. c. 2.

(4) By the 31 Geo. III. c. 32. No person professing the Roman catholic religion, who shall take and subscribe the oath required by that statute, shall be subject to the penalties in the statutes referred to in the preceding page.

perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it. And upon this score the municipal laws of some nations have given a much larger authority to the parents, than others. The ancient Roman laws gave the father a power of life and death over his children; upon this principle, that he who gave had also the power of taking away [a]. But the rigor of these laws was softened by subsequent constitutions; so that [b] we find a father banished by the emperor Hadrian for killing his son, though he had committed a very heinous crime, upon this maxim, that "*patria potestas in pietate debet, non in atrocitate, consistere.*" But still they maintained to the last a very large and absolute authority: for a son could not acquire any property of his own during the life of his father; but all his acquisitions belonged to the father, or at least the profits of them for his life [c].

THE power of a parent by our English laws is much more moderate; but still sufficient to keep the child in order and obedience. He may lawfully correct his child, being under age, in a reasonable manner [d]; for this is for the benefit of his education. The consent or concurrence of the parent to the marriage of his child under age, was also *directed* by our ancient law to be obtained: but now it is absolutely *necessary*; for without it the contract is void [e]. And this also is another means, which the law has put into the [453] parent's hands, in order the better to discharge his duty; first, of protecting his children from the snares of artful and designing persons; and, next, of settling them properly in life, by preventing the ill consequences of too early and precipitate marriages. A father has no other power over his son's *estate* than as his trustee or guardian; for, though he may receive the profits during the child's minority,

a Ff. 28. 2. 11. Cod. 8. 47. 10.
b Ff. 48. 9. 5.
c Inst. 2. 9. 1.
d 1 Hawk. P. C. 130.
e Stat. 26 Geo. II. c. 33.

yet he must account for them when he comes of age (5). He may indeed have the benefit of his children's labor while they live with him, and are maintained by him: but this is no more than he is entitled to from his apprentices or servants. The legal power of a father (for a mother, as such, is entitled to no power, but only to reverence and respect), the power of a father, I say, over the persons of his children ceases at the age of twenty-one: for they are then enfranchised by arriving at years of discretion, or that point which the law has established (as some must necessarily be established) when the empire of the father, or other guardian, gives place to the empire of reason. Yet, till that age arrives, this empire of the father continues even after his death; for he may by his will appoint a guardian to his children. He may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, *viz.* that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

3. The *duties* of children to their parents arise from a principle of natural justice and retribution. For to those, who gave us existence, we naturally owe subjection and obedience during our minority, and honor and reverence ever after: they, who protected the weakness of our infancy, are entitled to our protection in the infirmity of their age; they who by sustenance and education have enabled their offspring

(5) Where children have fortunes independent of their parents, lord Thurlow declared, that it was the practice in chancery to refer it to the master, to inquire whether the parents were of ability to maintain the children; if not, then to report what would be a proper maintenance; and this practice did not vary where a maintenance was directly given by the will, unless in cases where it was given to the father; under which circumstance it was a legacy to him. 1 *Bro.* 388.

to prosper, ought in return to be supported by that offspring in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents [454] which are enjoined by positive laws. And the Athenian laws[f] carried this principle into practice with a scrupulous kind of nicety: obliging all children to provide for their father, when fallen into poverty; with an exception to spurious children, to those whose chastity had been prostituted by consent of the father, and to those whom he had not put in any way of gaining a livelihood. The legislature, says baron Montesquieu[g], considered, that in the first case the father, being uncertain, had rendered the natural obligation precarious; that in the second case, he had sullied the life he had given, and done his children the greatest of injuries, in depriving them of their reputation; and that, in the third case, he had rendered their life (so far as in him lay) an insupportable burden, by furnishing them with no means of subsistence.

Our laws agree with those of Athens with regard to the first only of these particulars, the case of spurious issue. In the other cases the law does not hold the tie of nature to be dissolved by any misbehaviour of the parent; and therefore a child is equally justifiable in defending the person, or maintaining the cause or suit of a bad parent, as a good one; and is equally compellable[h], if of sufficient ability, to maintain and provide for a wicked and unnatural progenitor, as for one who has shewn the greatest tenderness and parental piety (6).

f Potter's Antiq. b. 4. c. 15. g Sp. L. b. 26. c. 6. h Stat. 43 Eliz. c. 2.

(6) The words of the statute are, "the father and grandfather, "mother and grandmother, and children of every poor and impotent "person," &c. from which words, and a former statute, Dr. Burn is inclined to think, even contrary to the opinion of lord Holt, that a grandchild is not compellable to relieve an indigent grandfather: but I

II. We are next to consider the case of illegitimate children, or bastards; with regard to whom let us inquire, 1. Who are bastards. 2. The legal duties of the parents towards a bastard child. 3. The rights and incapacities attending such bastard children.

1. Who are bastards. A bastard, by our English laws, is one that is not only begotten, but born, out of lawful matrimony. The civil and canon laws do not allow a child to remain a bastard, if the parents afterwards intermarry[1]: and herein they differ most materially from our law; which, though not so strict as to require that the child shall be *begotten*, yet makes it an indispensable condition, to make it legitimate, that it shall be *born*, after lawful wedlock. And the reason of our English law is surely much superior to that of the Roman, if we consider the principal end and design of establishing the contract of marriage, taken in a civil light; abstractedly from any religious view, which has nothing to do with the legitimacy or illegitimacy of the children. The main end and design of marriage therefore being to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong; this end is undoubtedly better answered by legitimating all issue born after wedlock, than by legitimating all issue of the same parties even born before wedlock, so as wedlock afterwards ensues; 1. Because of the very great uncertainty there will generally be, in the proof that the issue was really begotten by the same man; whereas, by confining the proof to the birth, and not to the begetting, our law has rendered it perfectly [455]

[1] Inst. 1. 10. 13. Decret. l. 4. t. 17. c. 1.

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should entertain no doubt but the court of king's bench would determine the duty to be reciprocal; and would construe any ambiguous expression in favor of the discharge of such a natural and moral obligation.

certain, what child is legitimate, and who is to take care of the child. 2. Because by the Roman law a child may be continued a bastard, or made legitimate at the option of the father and mother, by a marriage *ex post facto*; thereby opening a door to many frauds and partialities which by our law are prevented. 3. Because by those laws a man may remain a bastard till forty years of age, and then become legitimate, by the subsequent marriage of his parents; whereby the main end of marriage, the protection of infants, is totally frustrated. 4. Because this rule of the Roman law admits of no limitations as to the time or number of bastards so to be legitimated; but a dozen of them may, twenty years after their birth, by the subsequent marriage of their parents, be admitted to all the privileges of legitimate children. This is plainly a great discouragement to the matrimonial state; to which one main inducement is usually not only the desire of having *children*, but also the desire of procreating lawful *heirs*. Whereas our constitutions guard against this indecency, and at the same time give sufficient allowance to the frailties of human nature. For, if a child be begotten while the parents are *single*, and they will endeavour to make an early reparation for the offence, by marrying within a few months after, our law is so [456] indulgent as not to bastardize the child, if it be born, though not begotten, in lawful wedlock; for this is an incident that can happen but once, since all future children will be begotten, as well as born, within the rules of honor and civil society. Upon reasons like these we may suppose the peers to have acted at the parliament of Merton, when they refused to enact that children born before marriage should be esteemed legitimate [k].

k Rogaverunt omnes episcopi magnates, ut consentirent quod nati ante matrimonium essent legitimi, sicut illi qui nati sunt post matrimonium, quia ecclesia tales habet pro legitimis. Et omnes comites et barones una voce responderunt, quod nolunt leges Angliæ mutare, quæ hucusque usitatæ sunt et approbatæ. Stat. 20 Hen. III. c. 9. See the introduction to the great charter, Edit. Oxon. 1759. sub anno 1253.

From what has been said it appears, that all children born before matrimony are bastards by our law: and so it is of all children born so long after the death of the husband, that, by the usual course of gestation, they could not be begotten by him. But, this being a matter of some uncertainty, the law is not exact as to a few days[l]. And this gives occasion to a proceeding at common law, where a widow is suspected to feign herself with child, in order to produce a supposititious heir to the estate: an attempt which the rigor of the Gothic constitutions esteemed equivalent to the most atrocious theft, and therefore punished with death[m]. In this case with us the heir presumptive may have a writ *de ventre inspiciendo*, to examine whether she be with child or not[n] (7); and, if she be, to keep her under proper restraint, till delivered; which is entirely conformable to the practice of the civil law[o]: but, if the widow be upon due examination found not pregnant, the presumptive heir shall be admitted to the inheritance, though liable to loose it again, on the birth of a child within forty weeks from the death of a husband[p]. But if a man dies, and his widow soon after marries again, and a child is born within such a time, as that by the course of nature it might have been the child of either husband; in this case he is said to be more than ordinarily legiti- [457] mate; for he may, when he arrives to years of discretion, choose which of the fathers he pleases[q]. To prevent this, among other inconveniences, the civil law ordained that

l Cro. Jac. 541.
m Stiernhook de jure Gothor. l. 3. c. 5.
n Co. Litt. 8. Bract. l. 2. c. 32.
o Ff. 25. tit. 4. per tot.
p Britton. c. 66. pag. 166.
q Co. Litt. 8.

(7) In a case, where an estate was devised to a male child which might be born within forty weeks after the death of the testator of a married woman, whose husband had been long abroad, and if no such child, the estate was devised over, this writ *de ventre inspiciendo* was awarded against the woman on the petition of the subsequent devisee. 4 *Bro.* 90. See the proceedings under this writ, 2 *P. Wms.* 591.

no widow should marry *infra annum luctus*[r], a rule which obtained so early as the reign of Augustus[s], if not of Romulus: and the same constitution was probably handed down to our early ancestors from the Romans, during their stay in this island; for we find it established under the Saxon and Danish governments[t].

As bastards may be born before the coverture or marriage state is begun, or after it is determined, so also children born during wedlock may in some circumstances be bastards. As if the husband be out of the kingdom of England, (or, as the law somewhat loosely phrases it, *extra quatuor maria,*) for above nine months, so that no access to his wife can be presumed, her issue during that period shall be bastards[u]. But, generally, during the coverture access of the husband shall be presumed, unless the contrary can be shewn[v]; which is such a negative as can only be proved by shewing him to be elsewhere: for the general rule is, *praesumitur pro legitimatione*[w] (8). In a divorce, *a mensa et thoro*, if the wife breeds children, they are bastards; for the law will presume the husband and wife conformable to the sentence of separation, unless access be proved: but, in a voluntary separation by agreement, the law will suppose access, unless the negative be shewn[x]. So also if there is an apparent impossibility of procreation on the part of the husband, as if he be only eight years old, or the like, there the issue of the wife shall be bastards[y]. Likewise, in case of divorce in the spiritual court *a vinculo matrimonii*, all the issue born during

r Cod. 5. 9. 2.

s But the year was then only *ten* months. Ovid. Fast. I. 27.

t Sit omnis vidua sine marito duodecim menses. L.L. Ethelr. A. D. 1008. L.L. Canut. c. 71.

u Co. Litt. 244.

v Salk. 123. 3 P. W. 276. Stra. 925.

w 5 Rep. 98.

x Salk. 123.

y Co. Litt. 244.

(8) It used to be held, that, when the husband was living within the kingdom, access should be presumed, unless strict proof was adduced that the husband and wife were all the time living at a distance

the coverture are bastards [z]; because such divorce is always upon some cause, that rendered the marriage unlawful and null from the beginning.

2. Let us next see the duty of parents to their bastard children, by our law; which is principally that of maintenance. For, though bastards are not looked upon as children to any civil purposes, yet the ties of nature, of which maintenance is one, are not so easily dissolved: and they hold indeed as to many other intentions; as, particularly, that a man shall not marry his bastard sister or daughter [a]. The civil law, therefore, when it denied maintenance to bastards begotten under certain atrocious circumstances [b], was neither consonant to nature, nor reason; however profligate and wicked the parents might justly be esteemed.

The method in which the English law provides maintenance for them is as follows [c]. When a woman is delivered, or declares herself with child, of a bastard, and will by oath before a justice of peace charge any person as having got her with child, the justice shall cause such person to be apprehended, and commit him till he gives security, either to maintain the child (9), or appear at the next quarter sessions to dispute and try the fact. But if the women dies, or is married before delivery, or miscarries, or proves not to have

z Co. Litt. 235.
a Lord Raym. 68. Comb. 356.
b Nov. 89. c. 15.
c Stat. 18 Eliz. c. 3. 7 Jac. I. c. 4. 3 Car. I. c. 4. 13 and 14 Car. II. c. 12. 6 Geo. II. c. 31.

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from each other; but the courts have relaxed that rule, and have gone the length of holding that the legitimacy or illegitimacy of the child of a married woman, living in a notorious state of adultery, under all the circumstances, is a question for a jury to determine. 4 *T. R.* 356. and 251.

(9) If he gives a bond to indemnify the parish, and neglects to provide maintenance for the child, the parish officers may relieve it without an order from a justice, and may recover the money advanced in an action upon the bond. *H. Bl.* 253.

been with child, the person shall be discharged (10): otherwise the sessions, or two justices out of sessions, upon original application to them, may take order for the keeping of the bastard, by charging the mother or the reputed father with the payment of money or other sustentation for that purpose. And if such putative father, or lewd mother, run away from the parish, the overseers by direction of two justices may seize their rents, goods, and chattels, in order to bring up the said bastard child. Yet such is the humanity of our laws, that no woman can be compulsively questioned concerning the father of her child, till one month after her delivery: which indulgence is however very frequently a hardship upon parishes, by giving the parents opportunity to escape.

[459] 3. I PROCEED next to the rights and incapacities which appertain to a bastard. The rights are very few, being only such as he can *acquire*; for he can *inherit* nothing, being looked upon as the son of nobody; and some-

(10) Or he shall be discharged, if the justices at the sessions, upon hearing all the circumstances of the case, shall be of opinion that he is not the father of the child.

By the 6 Geo. II. c. 31. one magistrate may compel the person on whom the child is filiated, either to indemnify the parish by a bond with two sufficient sureties, or may bind him over to abide the order of the justices at the next sessions; but these can only, under the 18 Eliz. c. 3. make an order of maintenance upon him, they cannot compel him to give security for the performance of it. 6 *T. R.* 147. But if he disobeys this order, or the order of maintenance by two justices out of sessions, he may be punished by indictment for such disobedience.

It has been held at *nisi prius*, that the heir of the principal, or the heir of the surety, inheriting lands from his ancestor, may at any distance of time be sued upon the bond for the damages which the parish sustains by maintaining the bastard in his old age or his children, who have not obtained settlements in another parish or township.

times called *filius nullius*, sometimes *filius populi* [d] (11). Yet he may gain a surname by reputation [e], though he has none by inheritance. All other children have their primary settlement in their father's parish; but a bastard in the parish where born, for he hath no father [f]. However, in case of

d Fort. de L.L. c. 40. e Co. Litt. 3. f Salk. 427.

(11) But though he is considered *filius nullius* with respect to inheritances and successions, yet the law takes notice of his connection with his natural parents for some other purposes, as it prohibits him from forming an incestuous union by marriage; and it has been decided that if a bastard marries under age by license, he must have the consent of his putative father, guardian, or mother, according to the 26 Geo. II. c. 33. 1 *T. R.* 96.

In the case of Horner v. Liddiard, which was decided in the consistorial court in London in Trinity Term 1799, the circumstances were these:

Miss Liddiard was a natural child, her father was dead, and he by his will had appointed her mother her guardian; but that circumstance was immaterial, as a putative father cannot appoint a guardian. Whilst she was under age, she was married by license, with the consent of her mother, to Mr. Horner. The husband afterwards instituted this suit to have the marriage declared void. Sir William Scott admitted that bastards were so far within the marriage act, that if the marriage had been solemnized by license with the consent of a guardian of the court of chancery, the marriage would have been valid; but he decided, that neither an illegitimate father nor mother were competent to give consent to a marriage by license, and that in the present case the marriage was therefore null and void In delivering his judgment, that most learned judge was pleased to say; "I observe that the learned editor "of the last edition of the Commentaries has laid it down, that it has "been decided, that if a bastard marries under age by license, he must "have the consent of his putative father, *guardian*, or mother, accord-"ing to the statute. If the observation is to be understood according "to this arrangement, I cannot agree that it has been so decided. For "what guardian can be so interposed between the natural father and "mother?" If my construction of the marriage act in note 8. p. 438. is erroneous, then the word *guardian*, ought to have been placed after *mother*, and not before. But I meant only to state, that it had been

fraud, as if a woman be sent either by order of justices, or comes to beg as a vagrant, to a parish which she does not belong to, and drops her bastard there; the bastard shall, in the first case, be settled in the parish from whence she was illegally removed[g]: or, in the latter case, in the mother's own parish, if the mother be apprehended for her vagrancy[h]. Bastards also born in any licensed hospital for pregnant women, are settled in the parishes to which the mothers belong[i]. The incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs, but of his own body; for, being *nullius filius*, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived. A bastard was also, in strictness, incapable of holy orders; and, though that were dispensed with, yet he was utterly disqualified from holding any dignity in the church[k]: but this doctrine seems now obsolete; and in all other respects, there is no distinction between a bastard and another man (12). And really any other distinction, but that of

g Salk. 121.
h Stat. 17 Geo. II. c. 5.
i Stat. 13 Geo. III. c. 82.
k Fortesc. c. 40. 5 Rep. 58.

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decided by the court of king's bench, that bastards were to be considered as legitimate children under the marriage act. As the courts of law not only in settlement cases, but in all claims of inheritance, prosecutions for polygamy, and wherever the validity of a marriage can be questioned, are as competent to construe the marriage act as the ecclesiastical courts, notwithstanding the very able arguments adduced to support the judgment in Horner v. Liddiard, I trust I do not speak irreverently when I predict that the subject will undergo much further discussion and investigation before that judgment will be adopted by the temporal courts. See Dr. Croke's case of Horner v. Liddiard.

(12) Bastards are not favored in equity as legitimate children. The court will not supply the defect of a surrender of a copyhold in a conveyance or devise by a father to a natural child, as it will in favor of a legitimate child. *Gilb. For. Rom.* 256. 2 *Ves.* 582.

See farther concerning bastards, 2 vol. 247, & 506.

not inheriting, which civil policy renders necessary, would, with regard to the innocent offspring of his parents' crimes, be odious, unjust, and cruel to the last degree: and yet the civil law, so boasted of for its equitable decisions, made bastards in some cases incapable even of a gift from their parents[l]. A bastard may, lastly, be made legitimate, and capable of inheriting, by the transcendent power of an act of parliament, and not otherwise[m]: as was done in the case of John of Gaunt's bastard children, by a statute of Richard the second.

l 1 Col. 6. 57. 8.

m 4 Inst. 36.

CHAPTER THE SEVENTEENTH.

OF GUARDIAN AND WARD.

THE only general private relation now remaining to be discussed, is that of guardian and ward; which bears a very near resemblance to the last, and is plainly derived *out* of it: the guardian being only a temporary parent, that is, for so long time as the ward is an infant, or under age. In examining this species of relationship, I shall first consider the different kinds of guardians, how they are appointed, and their power and duty: next, the different ages of persons, as defined by the law: and lastly, the privileges and disabilities of an infant, or one under age and subject to guardianship.

1. THE guardian with us performs the office both of the *tutor* and *curator* of the Roman laws; the former of which had the charge of the maintenance and education of the minor, the latter the care of his fortune; or, according to the language of the court of chancery, the *tutor* was the committee of the person, the *curator* the committee of the estate. But this office was frequently united in the civil law[a]; as it is always in our law with regard to minors, though as to lunatics and idiots it is commonly kept distinct.

a Ff. 26. 4. 1.

Of the several species of guardians, the first are guardians *by nature:* viz. the father and (in some cases) the mother of the child. For if an estate be left to an infant, the father is by common law the guardian, and must account to his child for the profits[b] (1). And, with regard to daughters, it seems by construction of the statute 4 & 5 Ph. & Mar. c. 8. that the father might by deed or will assign a guardian to any woman-child under the age of sixteen, and, if none be so assigned, the mother shall in this case be guardian[c]. There are also guardians *for nurture*[d]; which are, of course, the father or mother, till the infant attains the age of fourteen years[e]: and in default of father or mother, the ordinary usually assigns some discreet person to take care of the infant's personal estate, and to provide for his maintenance and education[f]. Next are guardians *in socage*, (an appellation which will be fully explained in the second book of these commentaries,) who are also called guardians *by the common law*. These take place only when the minor is entitled to some estate in lands, and then by the common law the guardianship devolves upon his next of kin, to whom the inheritance cannot possibly descend; as, where the estate descended from his father, in this case his uncle by the mother's side cannot possibly inherit this estate, and therefore shall be the guardian[g]. For the law judges it improper to trust the person of an infant in his hands, who may by possibility become heir to him; that there may be no temptation, nor even suspicion of temptation, for him to abuse his trust[h]. The Roman laws

b Co. Litt. 88.
c 3 Rep. 39.
d Co. Litt. 88.
e Moor. 738. 3 Rep. 38.
f 2 Jones 90. 2 Lev. 163.
g Litt. sec. 123.
h Nunquam custodia alicujus de jure alicui remanet, de quo habeatur suspicio, quod possit vel velit aliquod jus in ipsa hæreditate clamare. Glanv. l. 7. c. 11.

(1) But an executor is not justified in paying to the father a legacy left to the child; and if he pays it to the father, and the father becomes insolvent, he may be compelled to pay it over again. 1 *P. Wms.* 295.

proceed on a quite contrary principle, committing the care of the minor to him who is the next to succeed to the inheritance, presuming that the next heir would take the best care of an estate, to which he has a prospect of succeeding: and this they boast to be "*summa providentia*[i]." But in the mean time they seem to have forgotten, how much [462] it is the guardian's interest to remove the incumbrance of his pupil's life from that estate for which he is supposed to have so great a regard[k]. And this affords Fortescue[l], and sir Edward Coke[m], an ample opportunity for triumph; they affirming, that to commit the custody of an infant to him that is next in succession is "*quasi agnum committere lupo, ad devorandum*[n] (2)." These guardians in socage, like those for nurture, continue only till the minor is four-

i Ff. 26. 4. 1.

k The Roman satirist was fully aware of this danger, when he puts this private prayer into the mouth of a selfish guardian;
—*pupillum o utinam, quem proximus haeres Impello, expungam.* Pers. 1. 12.

l. c. 44.

m 1 Inst. 88.

n See Stat. Hibern. 14 Hen. III. This policy of our English law is warranted by the wise institutions of Solon, who provided that no one should be another's guardian, who was to enjoy the estate after his death. (Potter's Antiq. b. 1. c. 26.) And Charondas, another of the Grecian legislators, directed that the inheritance should go to the father's relations, but the education of the child to the mother's; that the guardianship and right of succession might always be kept distinct. (Petit. Leg. Att. l. 6. t. 7.)

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(2) Lord chancellor Macclesfield has vehemently condemned the rule of our law, that the next of kin, to whom the land cannot descend, is to be the guardian in socage; and has declared that "it is not "grounded upon reason, but prevailed in barbarous times, before the "nation was civilized." 2 *P. Wms.* 262. But as the law has placed the custody of the infant under the care of one who is just as likely to be in a near degree of kindred as the heir; one who probably will have the same affection for his person, without having any interest in even wishing his death, and therefore removed from all suspicion, however ill-founded; I cannot but think there is more wisdom in placing the infant under the guardianship of such a relation, than under that of the next heir.

A socage guardian can only be where the infant takes lands by descent. If he has lands by descent both *ex parte paterna* and *ex parte materna*, then the next of kin on each side shall, respectively, be guar-

teen years of age; for then, in both cases, he is presumed to have discretion, so far as to choose his own guardian. This he may do, unless one be appointed by the father, by virtue of the statute 12 Car. II. c. 24. which, considering the imbecility of judgment in children of the age of fourteen, and the abolition of guardianship *in chivalry* (which lasted till the age of twenty-one, and of which we shall speak hereafter) enacts, that any father, under age or of full age, may by deed or will dispose of the custody of his child, either born or unborn, to any person, except a popish recusant, either in possession or reversion, till such child attains the age of one and twenty years (3). These are called guardians *by statute*, or *testamentary* guardians. There are also special guardians *by custom* of London, and other places[o]; but they are particular exceptions, and do not fall under the general law.

THE power and reciprocal duty of a guardian and ward are the same, *pro tempore*, as that of a father and child; and therefore I shall not repeat them: but shall only add, that the guardian, when the ward comes of age, is bound to give

o Co. Litt. 88.

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dians by socage of these lands; and of these two claimants the first occupant shall retain the custody of the infant's person. See Mr. Hargrave's notes to Co. Litt. 88. b. where these different kinds of guardianship are with great learning and perspicuity discriminated and discussed.

(3) By this statute, the father may dispose of the guardianship of any child unmarried under the age of twenty-one, by deed or will, executed in the presence of two or more witnesses, till such child attains the age of twenty-one, or for any less time. And the guardian so appointed has the tuition of the ward, and the management of his estate and property.

A father cannot appoint guardians under this statute to a natural child; but where he has named guardians by his will to an illegitimate child, the court of chancery will appoint the same persons guardians without any reference to a master for his approbation. 2 *Bro.* 583.

him an account of all that he has transacted on his behalf, and must answer for all losses by his wilful default or negligence. In order therefore to prevent disagreeable contests with young gentlemen, it has become a practice for many guardians, of large estates especially, to indemnify themselves by applying to the court of chancery, acting under its direction, and accounting annually before the officers of that court. For the lord chancellor is, by right derived from the crown, the general and supreme guardian of all infants, as well as idiots and lunatics; that is, of all such persons as have not discretion enough to manage their own concerns. In case therefore any guardian abuses his trust, the court will check and punish him; nay sometimes will proceed to the removal of him, and appoint another in his stead [p].

2. Let us next consider the ward or person within age, for whose assistance and support these guardians are constituted by law; or who it is, that is said to be within age. The ages of male and female are different for different purposes. A male at *twelve* years old may take the oath of allegiance; at *fourteen* is at years of discretion, and therefore may consent or disagree to marriage, may choose his guardian, and, if his discretion be actually proved, may make his testament of his personal estate; at *seventeen* may be an executor; and at *twenty-one* is at his own disposal, and may aliene his lands, goods, and chattels. A female also at *seven* years of age may be betrothed, or given in marriage; at *nine* is entitled to dower; at *twelve* is at years of maturity, and therefore may consent or disagree to marriage; and, if proved to have sufficient discretion, may bequeath her personal estate; at *fourteen* is at years of legal discretion, and may choose a guardian; at *seventeen* may be executrix; and at *twenty-one* may dispose of herself and her lands. So that full age in male or female is twenty-one years, which age is completed on the day preceding the anniversary of a person's

[p] 1 Sid. 424. 1 P. Will. 703.

birth[q] (4); who till that time is an infant, and so styled in law. Among the ancient Greeks and Romans *women* were never of age, but subject to perpetual guardianship[r], [464] unless when married "*nisi convenissent in manum viri:*" and, when that perpetual tutelage wore away in process of time, we find that, in females as well as males, full age was not till twenty-five years[s]. Thus by the constitution of different kingdoms, this period, which is merely arbitrary, and *juris positivi*, is fixed at different times. Scotland agrees with England in this point; (both probably copying from the old Saxon constitutions on the continent, which extended the age of minority "*ad annum vigesimum primum, et eo usque* "*juvenes sub tutelam reponunt*[t]") but in Naples they are of full age at *eighteen;* in France, with regard to marriage, not till *thirty:* and in Holland at *twenty-five*.

3. INFANTS have various privileges, and various disabilities: but their very disabilities are privileges; in order to secure them from hurting themselves by their own improvident acts. An infant cannot be sued but under the protection, and joining the name, of his guardian; for he is to defend him against all attacks as well by law as otherwise[u]: but he may sue either by his guardian, or *prochein amy*, his next friend who is not his guardian. This *prochein amy* may be

q Salk. 44. 625. Lord Raym. 480. 1096, Toder v. Sansam. Dom. Proc. 27 Feb. 1775.

r Pott. Antiq. b. 4. c. 11. Cic. pro Muren. 12.

s Inst. 1. 23. 1.

t Stiernhook de jure Sueonum. l. 2. c. 2. This is also the period when the king, as well as the subject, arrives at full age in modern Sweden. Mod. Un. Hist. xxxiii. 230.

u Co. Litt. 135.

(4) If he is born on the 1st of January, he is of age to do any legal act on the morning of the last day of December, though he may not have lived twenty-one years by nearly forty-eight hours: the reason assigned is, that in law there is no fraction of a day; and if the birth were on the first second of one day, and the act on the last second of the other, then twenty-one years would be complete; and in the law it is the same whether a thing is done upon one moment of the day or on another.

any person who will undertake the infant's cause; and it frequently happens, that an infant, by his *prochein amy*, institutes a suit in equity against a fraudulent guardian. In criminal cases, an infant of the age of *fourteen* years may be capitally punished for any capital offence[w]; but under the age of *seven* he cannot. The period between *seven* and *fourteen* is subject to much uncertainty: for the infant shall, generally speaking, be judged *prima facie* innocent; yet if he was *doli capax*, and could discern between good and evil at the time of the offence committed, he may be convicted and undergo judgment and execution of death, though he hath not attained to years of puberty or discretion[x]. And [465] sir Matthew Hale gives us two instances, one of a girl of thirteen, who was burned for killing her mistress; another of a boy still younger, that had killed his companion and hid himself, who was hanged; for it appeared by his hiding that he knew he had done wrong, and could discern between good and evil: and in such cases the maxim of law is, that *malitia supplet aetatem* (5). So also, in much more modern times, a boy of ten years old, who was guilty of a heinous murder, was held a proper subject for capital punishment, by the opinion of all the judges[y].

With regard to estates and civil property, an infant hath many privileges, which will be better understood when we come to treat more particularly of those matters; but this may be said in general, that an infant shall lose nothing by non-claim, or neglect of demanding his right; nor shall any other *laches* or negligence be imputed to an infant, except in some very particular cases.

w 1 Hal. P. C. 25. x Ibid. 26. y Foster. 72.

(5) In such cases, I conceive that justice tempered with mercy would inquire whether the malice is of such a hardened degree that a slighter punishment would not eradicate or correct it, and whether a milder sentence would not be sufficient to deter other boys of the same age from a repetition of the crime.

It is generally true, that an infant can neither aliene his lands, nor do any legal act, nor make a deed, nor indeed any manner of contract, that will bind him. But still to all these rules there are some exceptions: part of which were just now mentioned in reckoning up the different capacities which they assume at different ages: and there are others, a few of which it may not be improper to recite, as a general specimen of the whole. And, first, it is true, that infants cannot aliene their estates: but infant trustees, or mortgagees, are enabled to convey, under the direction of the court of chancery or exchequer, or other courts of equity, the estates they hold in trust or mortgage, to such person as the court shall appoint[z]. Also it is generally true, that an infant can do no legal act: yet, an infant, who has an advowson, may present to the benefice when it becomes void[a]. For the law in this case dispenses with one rule, in order to maintain others of far greater consequence: it permits an infant to [466] present a clerk (who, if unfit, may be rejected by the bishop) rather than either suffer the church to be unserved till he comes of age, or permit the infant to be debarred of his right by lapse to the bishop. An infant may also purchase lands, but his purchase is incomplete: for, when he comes to age, he may either agree or disagree to it, as he thinks prudent or proper, without alleging any reason; and so may his heirs after him if he dies without having completed his agreement[b]. It is, farther, generally true, that an infant, under twenty-one, can make no deed but what is afterwards voidable; yet in some cases[c] he may bind himself apprentice by deed indented or indentures, for seven years; and[d] he may by deed or will appoint a guardian to his children, if he has any. Lastly, it is generally true, that an infant can make no other contract that will bind him: yet he may bind himself to pay for his necessary meat, drink, apparel, physic,

z Stat. 7 Ann. c. 19. 4 Geo. III. c. 16.
a Co. Litt. 172.
b Ibid. 2.
c Stat. 5 Eliz. c. 4. 43 Eliz. c. 2. Cro. Car. 179.
d Stat. 12 Car. II. c. 24.

and such other necessaries (6); and likewise for his good teaching and instruction, whereby he may profit himself afterwards [e]. And thus much, at present, for the privileges and disabilities of infants.

e Co. Litt. 172.

(6) It has been held, that an infant is not liable to repay money lent to him, although he should lay it out in necessaries. 1 *Salk.* 386. Nor is he bound to pay for goods bought to trade with. *Bull. N. P.* 154. But debts contracted during infancy are a good consideration to support a promise made to pay them, when a person is of full age. Infancy may be given in evidence upon the general issue, or it may be pleaded. *Bull.* 152.

And where the defendant pleads infancy, and the plaintiff replies that the defendant confirmed the promise or contract when he was of age; the plaintiff need only prove the promise, and the defendant must discharge himself by proof of the infancy. 1 *T. R.* 648.

CHAPTER THE EIGHTEENTH.

OF CORPORATIONS.

WE have hitherto considered persons in their natural capacities, and have treated of their rights and duties. But, as all personal rights die with the person; and, as the necessary forms of investing a series of individuals, one after another, with the same identical rights, would be very inconvenient, if not impracticable; it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality.

THESE artificial persons are called bodies politic, bodies corporate, *(corpora corporata,)* or corporations: of which there is a great variety subsisting, for the advancement of religion, of learning, and of commerce: in order to preserve entire and for ever those rights and immunities, which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct. To shew the advantages of these incorporations, let us consider the case of a college in either of our universities, founded *ad studendum et orandum*, for the encouragement and support of religion and learning. If this were a mere voluntary assembly, the individuals which compose it might indeed read, pray, study, and perform scholastic exercises together, so long as they could agree to do so: but they could neither frame, nor receive any laws or rules of their

conduct; none at least, which would have any binding force, for want of a coercive power to create a sufficient obligation. Neither could they be capable of retaining any privileges or immunities: for, if such privileges be attacked, which of all this unconnected assembly has the right, or ability, to defend them? And, when they are dispersed by death or otherwise, how shall they transfer these advantages to another set of students, equally unconnected as themselves? So also with regard to holding estates or other property, if land be granted for the purposes of religion or learning to twenty individuals not incorporated, there is no legal way of continuing the property to any other persons for the same purposes, but by endless conveyances from one to the other, as often as the hands are changed. But when they are consolidated and united into a corporation, they and their successors are then considered as one person *in* law: as one person, they have one will, which is collected from the sense of the majority of the individuals: this one will *may* establish rules and orders for the regulation of the whole, which are a sort *of* municipal laws of this little republic; *or* rules and statutes may be prescribed to it at its creation, which are then *in* the place of natural laws: the privileges and immunities, the estates and possessions, of the corporation, when once vested in them will be for ever vested, without any new conveyance to new successions; for all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies: in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant.

THE honor of originally inventing these political constitutions entirely belongs to the Romans. They were introduced, as Plutarch says, by Numa; who finding, upon his accession, the city torn to pieces by the two rival factions of Sabines and Romans, thought it a prudent and politic measure to subdivide these two into many smaller ones, by insti-

ting separate societies of every manual trade and profession. They were afterwards much considered by the civil law [a], in which they were called *universitates*, as forming one whole out of many individuals; or *collegia*, from being gathered together: they were adopted also by the canon law, for the maintenance of ecclesiastical discipline; and from them our spiritual corporations are derived. But our laws have considerably refined and improved upon the invention, according to the usual genius of the English nation: particularly with regard to sole corporations, consisting of one person only, of which the Roman lawyers had no notion; their maxim being that "*tres faciunt collegium*[b]." Though they held, that if a corporation, originally consisting of three persons, be reduced to one "*si universitas ad unum redit*," it may still subsist as a corporation, "*et stet nomen universitatis*[c]."

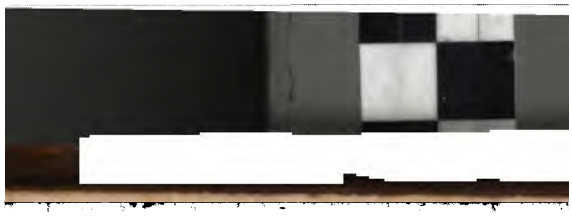
BEFORE we proceed to treat of the several incidents of corporations, as regarded by the laws of England, let us first take a view of the several sorts of them; and then we shall be better enabled to apprehend their respective qualities.

THE first division of corporation is into *aggregate* and *sole*. Corporations aggregate consist of many persons united together into one society, and are kept up by a perpetual succession of members, so as to continue for ever: of which kind are the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church. Corporations sole consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the king is a sole corporation[d]: so is a bishop: so are some deans, and prebendaries, distinct from their several chapters: and so is every parson and vicar. And the necessity, or at least use, of this institution will be very apparent, if we consider the case of a parson of a church. At the original endow-

a Ff. l. 3. t. 4. per tot.
b Ff. 50. 16. 8.
c Ff. 3, 4. 7.
d Co. Litt. 43.

ment of parish churches, the freehold of the church, the church-yard, the parsonage house, the glebe, and the tithes of the parish, were vested in the then parson by the bounty of the donor, as a temporal recompense to him for his spiritual care of the inhabitants, and with intent that the same emoluments should ever afterwards continue as a recompense for the same care. But how was this to be effected? The freehold was vested in the parson; and, if we suppose it vested in his natural capacity, on his death it might descend to his heir, and would be liable to his debts and incumbrances: or, at best, the heir might be compellable, at some trouble and expense, to convey those rights to the succeeding incumbent. The law therefore has wisely ordained, that the parson, *quatenus* parson, shall never die, any more than the king; by making him and his successors a corporation. By which means all the original rights of the parsonage are preserved entire to the successor: for the present incumbent, and his predecessor who lived seven centuries ago, are *in* law one and the same person; and what was given to the one was given to the other also.

ANOTHER division of incorporations, either sole or aggregate, is into *ecclesiastical* and *lay*. Ecclesiastical corporations are where the members that compose it are entirely spiritual persons; such as bishops; certain deans, and prebendaries; all archdeacons, parsons, and vicars; which are sole corporations; deans and chapters at present, and formerly prior and convent, abbot and monks, and the like, bodies aggregate. These are erected for the furtherance of religion, and perpetuating the rights of the church. Lay corporations are of two sorts, *civil* and *eleemosynary*. The civil are such as are erected for a variety of temporal purposes. The king, for instance, is made a corporation to prevent in general the possibility of an *interregnum* or vacancy of the throne, and to preserve the possessions of the crown entire; for immediately upon the demise of one king, his successor is, as we have formerly seen, in full possession of the regal rights and dignity. Other lay corporations are erected for the good government



of a town or particular district, as a mayor and commonalty, bailiff and burgesses, or the like: some for the advancement and regulation of manufactures and commerce; as the trading companies of London, and other towns: and some for the better carrying on of divers special purposes; as churchwardens, for conservation of the goods of the parish; the college of physicians and company of surgeons in London, for the improvement of the medical science; the royal society, for the advancement of natural knowledge; and the society of antiquaries, for promoting the study of antiquities. And among these I am inclined to think the general corporate bodies of the universities of Oxford and Cambridge must be ranked: for it is clear they are not spiritual or ecclesiastical corporations, being composed of more laymen than clergy: neither are they eleemosynary foundations, though stipends are annexed to particular magistrates and professors, any more than other corporations where the acting officers have standing salaries: for these are rewards *pro opera et labore*, not charitable donations only, since every stipend is preceded by service and duty: they seem therefore to be merely civil corporations (1). The eleemosynary sort are such as are constituted for the perpetual distribution of the free alms, or bounty, of the founder of them to such persons as he has directed. Of this kind are all hospitals for the maintenance of the poor, sick, and impotent: and all colleges, both *in* our universities and *out*[e] of them: which colleges are founded for two purposes; 1. For the promotion of piety and learning by proper regulations and ordinances. 2. For imparting assistance to the members of those bodies, in order to enable them to prosecute their devotion and studies with greater ease and assiduity. And all these eleemosynary corporations are, strictly speaking, lay and not ecclesiastical, even though composed of ecclesiastical persons[f], and although they in

e Such as at Manchester, Eton, Winchester, etc. f 1 Lord Raym. 6.

(1) It is now fully established that each university is a civil corporation. 3 *Burr.* 1656.

some things partake of the nature, privileges, and restrictions of ecclesiastical bodies (2).

[472] HAVING thus marshalled the several species of corporations, let us next proceed to consider, 1. How corporations, in general, may be created. 2. What are their powers, capacities, and incapacities. 3. How corporations are visited. And, 4. How they may be dissolved.

I. CORPORATIONS, by the civil law, seem to have been created by the mere act, and voluntary association of their members; provided such convention was not contrary to law, for then it was *illicitum collegium* [g]. It does not appear that the prince's consent was necessary to be actually given to the foundation of them; but merely that the original founders of these voluntary and friendly societies (for they were little more than such) should not establish any meetings in opposition to the laws of the state.

BUT, with us in England, the king's consent is absolutely necessary to the erection of any corporation, either impliedly or expressly given [h]. The king's implied consent is to be found in corporations which exist by force of the *common law*, to which our former kings are supposed to have given their concurrence; common law being nothing else but custom, arising from the universal agreement of the whole community. Of this sort are the king himself, all bishops, parsons, vicars, churchwardens, and some others; who by common

g Ff. 47. 22. 1. Neque societas, neque collegium, neque hujusmodi corpus passim omnibus habere conceditur; nam et legibus, et senatus consultis, et principalibus constitutionibus ea res coercetur. Ff. 3. 4. 1.

h Cities and towns were first erected into corporate communities on the continent, and endowed with many valuable privileges, about the eleventh century: (Roberts. Cha. V. i. 36.) to which the consent of the feodal sovereign was absolutely necessary, as many of his prerogatives and revenues were thereby considerably diminished.

(2) They are lay corporations, because they are not subject to the jurisdiction of the ecclesiastical courts, or to the visitations of the ordinary or diocesan in their spiritual characters.

law have ever been held (as far as our books can shew us) to have been corporations, *virtute officii*: and this incorporation is so inseparably annexed to their offices, that we cannot frame a complete legal idea of any of these persons, but we must also have an idea of a corporation, capable to transmit his rights to his successors, at the same time. Another [473] method of implication, whereby the king's consent is presumed, is as to all corporations by *prescription*, such as the city of London, and many others[i], which have existed as corporations, time whereof the memory of man runneth not to the contrary; and therefore are looked upon in law to be well created. For though the members thereof can shew no legal charter of incorporation, yet in cases of such high antiquity the law presumes there once was one; and that by the variety of accidents, which a length of time may produce, the charter is lost or destroyed. The methods by which the king's consent is expressly given, are either by act of parliament or charter. By act of parliament, of which the royal assent is a necessary ingredient, corporations may undoubtedly be created[j]: but it is observable, that (till of late years) most of those statutes, which are usually cited as having created corporations, do either confirm such as have been before created by the king; as in the case of the college of physicians erected by charter 10 Hen. VIII[k], which charter was afterwards confirmed in parliament[l]; or, they permit the king to erect a corporation *in futuro* with such and such powers; as is the case of the bank of England[m], and the society of the British fishery[n]. So that the immediate creative act was usually performed by the king alone, in virtue of his royal prerogative[o].

ALL the other methods therefore whereby corporations exist, by common law, by prescription, and by act of parliament, are for the most part reducible to this of the king's letters patent, or charter of incorporation. The king's creation may be

i 2 Inst. 330.
j 10 Rep. 29. 1 Roll. Abr. 513.
k 8 Rep. 114.
l 14 and 15 Hen. VIII. c. 5.
m Stat. 5 and 6 W. and M. c. 20.
n Stat. 23 Geo. II. c. 4.
o See page 272.

performed by the words "*creamus, erigimus, fundamus, incorporamus*," or the like. Nay it is held, that if the [474] king grants to a set of men to have *gildam mercatoriam*, a mercantile meeting or assembly [p], this is alone sufficient to incorporate and establish them for ever [q].

THE parliament, we observed, by its absolute and transcendent authority, may perform this, or any other act whatsoever: and actually did perform it to a great extent, by statute 39 Eliz. c. 5. which incorporated all hospitals and houses of correction founded by charitable persons, without farther trouble: and the same has been done in other cases of charitable foundations. But otherwise it has not formerly been usual thus to intrench upon the prerogative of the crown, and the king may prevent it when he pleases. And, in the particular instance before-mentioned, it was done, as sir Edward Coke observes [r], to avoid the charges of incorporation and licenses of mortmain in small benefactions; which in his days were grown so great, that they discouraged many men from undertaking these pious and charitable works.

THE king (it is said) may grant to a subject the power of erecting corporations [s], though the contrary was formerly held [t]: that is, he may permit the subject to name the persons and powers of the corporation at his pleasure; but it is really the king that erects, and the subject is but the instrument: for though none but the king can make a corporation, yet *qui facit per alium, facit per se* [u]. In this manner the chancellor of the university of Oxford has power by charter to erect corporations; and has actually often exerted it, in the erection of several matriculated companies, now subsisting, of tradesmen subservient to the students.

p *Gild* signified among the Saxons a fraternity, derived from the verb ȝildan to pay, because every man paid his share towards the expenses of the community. And hence their place of meeting is frequently called the *Gild* or *Guild hall*.

q 10 Rep. 30. 1 Roll. Abr. 513.

r 2 Inst. 722.

s Bro. Abr. tit. Prerog. 53. Viner. Prerog. 88. pl. 16.

t Yearbook, 2 Hen. VII. 13.

u 10 Rep. 33.

When a corporation is erected, a name must be given to it; and by that name alone it must sue and be sued, and do all legal acts; though a very minute variation [475] therein is not material[u]. Such name is the very being of its constitution; and, though it is the will of the king that erects the corporation, yet the name is the knot of its combination, without which it could not perform its corporate functions[w]. The name of incorporation, says Sir Edward Coke, is as a proper name, or name of baptism; and therefore when a private founder gives his college or hospital a name, he does it only as a godfather; and by that same name the king baptizes the incorporation[x] (3).

II. After a corporation is so formed and named, it acquires many powers, rights, capacities, and incapacities, which we are next to consider. Some of these are necessarily and inseparably incident to every corporation; which incidents, as soon as a corporation is duly erected, are tacitly annexed of course[y]. As, 1. To have perpetual succession. This is the very end of its incorporation: for there cannot be a succession for ever without an incorporation[z]; and therefore all aggregate corporations have a power necessarily implied of electing members in the room of such as go off[a] (4).

u 10 Rep. 122.
w Gilb. Hist. C. P. 182.
x 10 Rep. 28.
y Ibid. 30. Hob. 211.
z 10 Rep. 26.
a 1 Roll. Abr. 514.

(3) But it may have a name only by implication; as if the king should incorporate the inhabitants of Dale with power to choose a mayor annually, though no name be given, yet it is a good corporation by the name of mayor and commonalty. 1 Salk. 191. And it may change its name, as corporations frequently do in new charters, and it still retains its former rights and privileges. 4 *Co.* 87.

(4) And where the mode of election is not prescribed by the charter, or established by immemorial usage, it may be regulated by a by-law. 3 *T. R.* 189. When the electors are described in the charter, their number, in order to avoid riot and confusion, may be restrained by a by-law; but a by-law cannot strike off an integral part, neither can it narrow the number of persons out of whom the elec-

2. To sue or be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may. 3. To purchase lands, and hold them, for the benefit of themselves and their successors; which two are consequential to the former (5). 4. To have a common seal. For a corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse: it therefore acts and speaks only by its common seal. For, though the particular members may express their private consents to any act, by words, or signing their names, yet this does not bind the corporation: it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole[b]. 5. To make by-laws or private statutes [476] for the better government of the corporation; which are binding upon themselves, unless contrary to the laws of the land, and then they are void. This is also included by law in the very act of incorporation[c]: for, as natural reason is given to the natural body for the governing it, so by-laws or statutes are a sort of political reason to govern the body politic (6). And this right of making by-laws for their own government, not contrary to the law of the land, was allowed by the law of the twelve tables of Rome[d]. But no trading company is, with us, allowed to make by-laws,

b Dav. 44. 48.
c Hob. 211.
d Sodales legem quam volent, dum ne quid ex publica lege corrumpant, sibi ferunto.

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tion is to be made. 3 *Burr.* 1833. But the number of the electors of members of parliament cannot be diminished by a by-law. 4 *Inst.* 48.

(5) All corporations must have a license from the king to enable them to purchase and hold lands in mortmain. *Co. Litt.* 2. 7 & 8 *W.* III. *c.* 37.

(6) Where the power of making by-laws is in the body at large, they may delegate their right to a select body, who thus become the representative of the whole community. *Ld. Mansfield*, 3 *Burr.* 1837.

which may affect the king's prerogative, or the common profit of the people, under penalty of 40*l.* unless they be approved by the chancellor, treasurer, and chief justices, or the judges of assize in their circuits: and, even though they be so approved, still, if contrary to law, they are void [e]. These five powers are inseparably incident to every corporation, at least to every corporation *aggregate*: for two of them, though they may be practised, yet are very unnecessary to a corporation *sole*; *viz.* to have a corporate seal to testify his sole assent, and to make statutes for the regulation of his own conduct.

THERE are also certain privileges and disabilities that attend an aggregate corporation, and are not applicable to such as are sole; the reason of them ceasing, and of course the law. It must always appear by attorney; for it cannot appear in person, being, as sir Edward Coke says [f], invisible, and existing only in intendment and consideration of law. It can neither maintain, or be made defendant to, an action of battery or such like personal injuries: for a corporation can neither beat nor be beaten, in its body politic [g]. A corporation cannot commit treason, or felony, or other crime, in its corporate capacity [h]: though its members may in their distinct individual capacities [i]. Neither is it capable of suffering a traitor's or felon's punishment, for it is [477] not liable to corporal penalties, nor to attainder, forfeiture, or corruption of blood. It cannot be executor or administrator, or perform any personal duties; for it cannot take an oath for the due execution of the office. It cannot be seised of lands to the use of another [j]; for such kind of confidence is foreign to the end of its institution. Neither can it be committed to prison [k]: for its existence being ideal, no man can apprehend or arrest it. And therefore also it

e Stat. 19 Hen. VII. c. 7. 11 Rep. 54.

f 10 Rep. 32.

g Bro. Abr. tit. Corporation. 63.

h 10 Rep. 32.

i The civil law also ordains that, for the misbehaviour of a body corporate, the directors only shall be answerable in their personal capacities. Ff. 4. 3. 15.

j Bro. Abr. tit. Feoffm. al. uses. 40. Bacon of uses. 347.

k Plowd. 539.

cannot be outlawed; for outlawry always supposes a precedent right of arresting, which has been defeated by the parties absconding, and that also a corporation cannot do: for which reasons the proceedings to compel a corporation to appear to any suit by attorney are always by distress on their lands and goods[l]. Neither can a corporation be excommunicated: for it has no soul, as is gravely observed by sir Edward Coke[m]: and therefore also it is not liable to be summoned into the ecclesiastical courts upon any account; for those courts act only *pro salute animae*, and their sentences can only be inforced by spiritual censures: a consideration, which, carried to its full extent, would alone demonstrate the impropriety of these courts interfering in any temporal righst whatsoever.

THERE are also other incidents and powers, which belong to some sort of corporations, and not to others. An aggregate corporation may take goods and chattels for the benefit of themselves and their successors, but a sole corporation cannot[n]: for such moveable property is liable to be lost or embezzled, and would raise a multitude of disputes between the successor and executor; which the law is careful to avoid (7). In ecclesiastical and eleemosynary foundations, the king or the founder may give them rules, laws, statutes, and ordinances which they are bound to observe: but corpo-
[478] rations merely lay, constituted for civil purposes, are subject to no particular statutes (8); but to the common law, and to their own by-laws, not contrary to the laws of the realm[o]. Aggregate corporations also, that have by their constitution a head, as a dean, warden, master, or the like, cannot do any acts during the vacancy of the headship,

l Bro. Abr. tit. Corporation. 11. Outlawry. 72.
m 10 Rep. 32.
n Co. Litt. 46.
o Lord Raym. 8.

(7) Mr. Hargrave considers the jewels of the crown rather as heirlooms, than an instance of chattels passing in succession in a sole corporation. *Co. Litt.* 9. n. 1.

(8) Their charters or immemorial usages, which are equivalent to the express provisions of a charter, are in fact their statutes.

except only appointing another: neither are they then capable of receiving a grant; for such corporation is incomplete without a head[p]. But there may be a corporation aggregate constituted without a head[q]: as the collegiate church of Southwell in Nottinghamshire, which consists only of prebendaries; and the governors of the charter-house, London, who have no president or superior, but are all of equal authority. In aggregate corporations also, the act of the major part is esteemed the act of the whole[r]. By the civil law this major part must have consisted of two thirds of the whole; else no act could be performed[s]: which perhaps may be one reason why they required three at least to make a corporation. But, with us, *any* majority is sufficient to determine the act of the whole body. And whereas, notwithstanding the law stood thus, some founders of corporations had made statutes in derogation of the common law, making very frequently the unanimous assent of the society to be necessary to any corporate act; (which king Henry VIII. found to be a great obstruction to his projected scheme of obtaining a surrender of the lands of ecclesiastical corporations,) it was therefore enacted by statute 33 Hen. VIII. c. 27. that all private statutes shall be utterly void, whereby any grant or election, made by the head, with the concurrence of the major part of the body, is liable to be obstructed by any one or more, being the minority: but this statute extends not to any negative or necessary voice, given by the founder to the head of any such society (9).

p Co. Litt. 263, 264.
q 10 Rep. 30.
r Bro. Abr. tit. Corporation. 31. 34.
s Ff. 3. 4. 3.

(9) This act clearly vacates all private statutes, both prior and subsequent to its date, which require the concurrence of more than a majority to give validity to any grant or election. The learned Judge is of opinion, that it has not affected the negative given by the statutes to the head of any society; but I am inclined to think this opinion may be questioned; especially in cases where, in the first instance, he gives his vote with the members of the society. It is the usual language of college statutes to direct that many acts shall be done by *gardianus & major pars sociorum*, or *magister*, or *præpositus et major pars*; and it has

We before observed that it was incident to every corporation, to have a capacity to purchase lands for themselves and successors: and this is regularly true at the common law[t]. But they are excepted out of the statute of wills[u]: so that no devise of lands to a corporation by will is good: except for charitable uses, by statute 43 Eliz. c. 4.[w]: which exception is again greatly narrowed by the statute 9 Geo. II. c. 36. And also, by a great variety of statutes[x], their privilege even of purchasing from any living grantor is much abridged: so that now a corporation, either ecclesiastical or lay, must have a license from the king to purchase[y]; before they can exert that capacity which is vested in them by the common law: nor is even this in all cases sufficient. These statutes are generally called the statutes of *mortmain:* all purchases made by corporate bodies being said to be purchases in *mortmain, in mortua manu:* for the reason of which appellation sir Edward Coke[z] offers many conjectures; but there is one which seems more probable than any that he has given us: *viz.* that these purchases being usually made by ecclesiastical bodies, the members of which (being professed) were reckoned dead persons in law, land therefore, holden by them, might with great propriety be said to be held *in mortua manu* (10).

[479]

t 10 Rep. 30.

u 34 Hen. VIII. c. 5.

w Hob. 136.

x From magna carta, 9 Hen. III. c. 36. to 9 Geo. II. c. 36.

y By the civil law a corporation was incapable of taking lands, unless by special privilege from the emperor; collegium, si nullo speciali privilegio subnixum sit, hæreditatem capere non posse, dubium non est. Cod. 6. 24. 8.

z 1 Inst. 2.

been determined by the court of king's bench, (*Coup. 377.*) and by the visitor of Clare-hall, Cambridge, and also by the visitors of Dublin college, that this expression does not confer upon the warden, master, or provost, any negative; but that his vote must be counted with the rest, and that he is concluded by a majority of votes against him.

(10) If I might add another conjecture upon the origin of this word, I should say that lands held by a corporation, on account of the perpetuity of succession, did not yield to the lord the great feudal fruits of relief, wardship, and marriage; and for that reason they might be said to be held in a dead or unproductive hand.

I SHALL defer the more particular exposition of these statutes of mortmain till the next book of these commentaries, when we shall consider the nature and tenures of estates; and also the exposition of those disabling statutes of queen Elizabeth, which restrain spiritual and eleemosynary corporations from aliening such lands as they are at present in legal possession of: only mentioning them in this place, for the sake of regularity, as statutable incapacities incident and relative to corporations.

THE general *duties* of all bodies politic, considered in their corporate capacity, may, like those of natural persons, be reduced to this single one: that of acting up to [480] the end or design, whatever it be, for which they were created by their founder.

III. I PROCEED therefore next to inquire, how these corporations may be *visited*. For corporations being composed of individuals, subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons to visit, inquire into, and correct all irregularities that arise in such corporations, either sole or aggregate, and whether ecclesiastical, civil, or eleemosynary. With regard to all ecclesiastical corporations, the ordinary is their visitor, so constituted by the canon law, and from thence derived to us. The pope formerly, and now the king, as supreme ordinary, is the visitor of the arch-bishop or metropolitan; the metropolitan has the charge and coercion of all his suffragan bishops; and the bishops in their several dioceses are in ecclesiastical matters the visitors of all deans and chapters, of all parsons and vicars, and of all other spiritual corporations. With respect to all lay corporations, the founder, his heirs, or assigns, are the visitors, whether the foundation be civil or eleemosynary; for in a lay incorporation the ordinary neither can nor ought to visit [a].

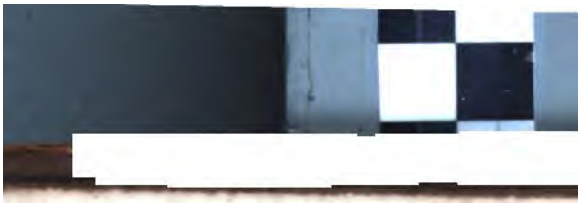
[a] 10 Rep. 31.

I KNOW it is generally said, that civil corporations are subject to no visitation, but merely to the common law of the land; and this shall be presently explained. But first, as I have laid it down as a rule that the founder, his heirs, or assigns, are the visitors of all lay corporations, let us inquire what is meant by the *founder*. The founder of all corporations in the strictest and original sense is the king alone, for he only can incorporate a society; and in civil incorporations, such as mayor and commonalty, &c. where there are no possessions or endowments given to the body, there is no other founder but the king: but in eleemosynary foundations, such as colleges and hospitals, where there is an endowment of lands, the law distinguishes, and makes two species of foundation; the one *fundatio incipiens*. or the incorporation, in which sense the king is the general founder of all colleges and hospitals; the other *fundatio perficiens*, or the dotation of it, in which sense the first *gift* of the revenues is the foundation, and he who gives them is in law the founder: and it is in this last sense that we generally call a man the founder of a college or hospital[b]. But here the king has his prerogative: for, if the king and a private man join in endowing an eleemosynary foundation, the king alone shall be the founder of it. And, in general, the king being the sole founder of all civil corporations, and the endower the perficient founder of all eleemosynary ones, the right of visitation of the former results, according to the rule laid down, to the king; and of the latter to the patron or endower.

[481]

THE king being thus constituted by law visitor of all civil corporations, the law has also appointed the place, wherein he shall exercise this jurisdiction: which is the court of king's bench; where, and where only, all misbehaviours of this kind of corporations are inquired into and redressed, and all their controversies decided. And this is what I understand to be the meaning of our lawyers, when they say that these civil corporations are liable to no visitation; that

b 10 Rep. 33.



is, that the law having by immemorial usage appointed them to be visited and inspected by the king their founder, in his majesty's court of king's bench, according to the rules of the common law, they ought not to be visited elsewhere, or by any other authority [c]. And this is so strictly true, that though the king by his letters patent had subjected the college of physicians to the visitation of four very respectable persons, the lord chancellor, the two chief justices, and the chief baron; though the college had accepted this charter with all possible marks of acquiescence, and had acted under it for near a century; yet in 1753, the authority of this provision coming in dispute, on an appeal preferred to these supposed visitors, they directed the legality of their own appointment to be argued: [482] and, as this college was merely a civil and not an eleemosynary foundation, they at length determined, upon several days solemn debate, that they had no jurisdiction as visitors; and remitted the appellant (if aggrieved) to his regular remedy in his majesty's court of king's bench.

As to eleemosynary corporations, by the dotation the founder and his heirs are of common right the legal visitors, to see that such property is rightly employed, as might otherwise have descended to the visitor himself: but, if the founder has appointed and assigned any other person to be visitor, then his assignee so appointed is invested with all the founder's power, in exclusion of his heir. Eleemosynary corporations are chiefly

c This notion is perhaps too refined. The court of king's bench, (it may be said,) from its general superintendent authority where other jurisdictions are deficient, has power to regulate all corporations where no special visitor is appointed. But not in the light of visitor: for as its judgments are liable to be reversed by writs of error, it may be thought to want one of the essential marks of visitatorial power (11).

(11) And it wants, I conceive, another mark of visitatorial power; which is, the discretion of a visitor, voluntarily to regulate and superintend. The court of king's bench, upon a proper complaint and application, can prevent and punish injustice in civil corporations, as in every other part of their jurisdiction; but it is not the language of the profession to call that part of their authority a visitatorial power.

hospitals, or colleges in the universities. These were all of them considered, by the popish clergy, as of mere ecclesiastical jurisdiction: however, the law of the land judged otherwise; and, with regard to hospitals, it has long been held [d], that if the hospital be spiritual, the bishop shall visit; but if lay, the patron. This right of lay patrons was indeed abridged by statute 2 Hen. V. c. 1. which ordained, that the ordinary should visit *all* hospitals founded by subjects; though the king's right was reserved, to visit by his commissioners such as were of royal foundation. But the subject's right was in part restored by statute 14 Eliz. c. 5. which directs the bishop to visit such hospitals only, where no visitor is appointed by the founders thereof: and all the hospitals founded by virtue of the statute 39 Eliz. c. 5. are to be visited by such persons as shall be nominated by the respective founders. But still, if the founder appoints nobody, the bishop of the diocese must visit [e].

COLLEGES in the universities (whatever the common law may now, or might formerly, judge) were certainly considered by the popish clergy, under whose direction they were, as *ecclesiastical*, or at least as *clerical*, corporations; and therefore the right of visitation was claimed by the ordinary of the [483] diocese. This is evident, because in many of our most ancient colleges, where the founder had a mind to subject them to a visitor of his own nomination, he obtained for that purpose a papal bulle to exempt them from the jurisdiction of the ordinary; several of which are still preserved in the archives of the respective societies. And in some of our colleges, where no special visitor is appointed, the bishop of that diocese, in which Oxford was formerly comprised, has immemorially exercised visitatorial authority (12); which can be ascribed to nothing else, but his supposed title as ordinary to visit this, among other ecclesiastical foundations. And it is

d Year book, 8 Edw. III. 28. 8 Ass. 29. e 2 Inst. 725.

(12) That is, the bishop of Lincoln, from whose diocese that of Oxford was taken.

not impossible, that the number of colleges in Cambridge, which are visited by the bishop of Ely, may in part be derived from the same original (13).

But, whatever might be formerly the opinion of the clergy, it is now held as established common law, that colleges are lay corporations, though sometimes totally composed of ecclesiastical persons; and that the right of visitation does not arise from any principles of the canon law, but of necessity was created by the common law[f]. And yet the power and jurisdiction of visitors in colleges was left so much in the dark at common law, that the whole doctrine was very unsettled till the famous case of *Philips and Bury*[g]. In this the main question was, whether the sentence of the bishop of Exeter, who (as visitor) had deprived doctor Bury the rector of Exeter college, could be examined and redressed by the court of king's bench. And the three puisne judges were of opinion, that it might be reviewed, for that the visitor's jurisdiction could not exclude the common law; and accordingly judgment was given in that court. But the lord chief justice Holt was of a contrary opinion; and held, that by the common law the office of visitor is to judge according to the statutes of the college, and to expel and deprive upon just occasions, and to hear all appeals of course: and that from him, and him only, the party grieved ought to have redress: the founder having reposed in him so entire a confidence, that he will administer justice impartially, [484] that his determinations are final, and examinable in no other court whatsoever. And, upon this, a writ of error

f Lord Raym. 8. Skinn. 407. Salk. 403. Carthew, 180.
g Lord Raym. 5. 4 Mod. 106. Show. 35.

(13) In the university of Cambridge, I am inclined to think, that the bishop of Ely has no visitatorial authority from prescription; but that in every instance, in which he is visitor, he is appointed by the express declaration and special provision of the founder. He, without doubt, was fixed upon from the dignity of his station and the proximity of his residence.

being brought into the house of lords, they concurred in sir John Holt's opinion, and reversed the judgment of the court of king's bench. To which leading case all subsequent determinations have been conformable. But, where the visitor is under a temporary disability, there the court of king's bench will interpose, to prevent a defect of justice [h]. Also it is said [i], that if a founder of an eleemosynary foundation appoints a visitor, and limits his jurisdiction by rules, and statutes, if the visitor in his sentence exceeds those rules, an action lies against him; but it is otherwise, where he mistakes in a thing within his power (14).

IV. We come now, in the last place, to consider how corporations may be dissolved. Any particular member may be

h Stra. 797. i 2 Lutw. 1566.

(14) No particular form of words is necessary for the appointment of a visitor. *Sit visitator*, or *visitationem commendamus*, will create a general visitor, and confer all the authority incidental to the office; (1 *Burr.* 199.) but this general power may be restrained and qualified, or the visitor may be directed by the statute to do particular acts, in which instances he has no discretion as visitor: as where the statutes direct the visitor to appoint one of two persons nominated by the fellows, the master of a college; the court of king's bench will examine the nomination of the fellows, and if correct, will compel the visitor to appoint one of the two. 2 *T. R.* 290. New ingrafted fellowships, if no statutes are given by the founders of them, must follow the original foundation, and are subject to the same discipline and judicature. 1 *Burr.* 203. It is the duty of the visitor, in every instance, to effectuate the intention of the founder, as far as he can collect it from the statutes and the nature of the institution; and in the exercise of this jurisdiction he is free from all control. Lord Mansfield has declared, that "the visitatorial power, if properly exercised, without expense or delay, is "useful and convenient to colleges; and it is now settled and established that the jurisdiction of a visitor is summary, and without "appeal from it." 1 *Burr.* 200. It has been determined that, where the founder of a college or eleemosynary corporation has appointed no special visitor, if his heirs become extinct, or if they cannot be found, the right of visitation devolves to the king, to be exercised by the chancellor in the same manner, as where the king himself is the founder. 4 *T. R.* 233. 2 *Ves. jun.* 609.

disfranchised, or lose his place in the corporation, by acting contrary to the laws of the society, or the laws of the land: or he may resign it by his own voluntary act[k]. But the body politic may also itself be dissolved in several ways; which dissolution is the civil death of the corporation; and in this case their lands and tenements shall revert to the person, or his heirs, who granted them to the corporation: for the law doth annex a condition to every such grant, that if the corporation be dissolved, the grantor shall have the lands again, because the cause of the grant faileth[l]. The grant is indeed only during the life of the corporation; which *may* endure for ever: but, when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life. The debts of a corporation, either to or from it, are totally extinguished by its dissolution; so that the members thereof cannot recover, or be charged with them, in their natural capacities[m]; agreeable to that maxim of the civil law[n], "*si quid universitati debetur, singulis non debetur; nec, quod debet universitas, singuli debent.*"

A CORPORATION may be dissolved, 1. By act of parliament, which is boundless in its operations. 2. By [485] the natural death of all its members, in case of an aggregate corporation. 3. By surrender of its franchises into the hands of the king, which is a kind of suicide. 4. By forfeiture of its charter, through negligence or abuse of its franchises; in which case the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is void. And the regular course is to bring an information in nature of a writ of *quo warranto*, to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings. The exertion of this act of law, for the purposes of the state in the reigns of king Charles and king James the second, particularly by seising the charter of the city of Lon-

k 11 Rep. 98.
l Co. Litt. 13.
m 1 Lev. 237.
n Ff. 3. 4. 7.

don, gave great and just offence; though perhaps, in strictness of law, the proceedings in most of them were sufficiently regular: but the judgment against that of London was reversed by act of parliament [o] after the revolution; and by the same statute it is enacted, that the franchises of the city of London shall never more be forfeited for any cause whatsoever. And, because by the common law corporations were dissolved, in case the mayor or head officer was not duly elected on the day appointed in the charter or established by prescription, it is now provided [p], that for the future no corporation shall be dissolved upon that account; and ample directions are given for appointing a new officer, in case there be no election, or a void one, made upon the prescriptive or charter day.

o Stat. 2 W. and M. c. 8.

p Stat. 11 Geo. I. c. 4.

END OF THE FIRST BOOK.

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